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The Employment Law Decisions of the October 2000 Term of the Supreme Court: A Review and Analysis

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THE EMPLOYMENT LAW DECISIONS OF THE OCTOBER 2000 TERM OF THE SUPREME COURT: A REVIEW AND ANALYSIS

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I. INTRODUCTION

During the October 2000 Term, the Supreme Court delivered major setbacks for employees in *Circuit City Stores, Inc. v. Adams*,[1] which upheld mandatory and binding arbitration of federal and state employment discrimination claims through arbitration clauses forced upon employees as a condition of employment, and in *Board of Trustees of the University of Alabama v. Garrett*,[2] which shielded state employers from federal court law suits brought under the Americans with Disabilities Act by victims of disability discrimination in employment. Employees escaped harm in *Pollard v. E.I du Pont de Nemours & Co.*,[3] in which the Court followed nearly unanimous circuit court of appeals precedent and rather clear statutory language in deciding that the Title VII front pay remedy is not subject to the limitations on compensatory damages (known as "caps") set forth in the Civil Rights Act of 1991.[4] This article discusses these and other cases from the October 2000 Term of the Court, involving arbitration, attorney's fees, opposition to sexual harassment and ERISA preemption.

II. MANDATORY ARBITRATION OF EMPLOYMENT CLAIMS

Arbitration substantially occupied the time of the Court in the 2000 term. The Court decided five cases involving arbitration, three in the labor and employment law context.

1. 121 S. Ct. 1302 (2001).
2. 531 U.S. 356 (2001).
3. 121 S. Ct. 1946 (2001).
4. 42 U.S.C. §§ 1981(a)(1) & (2) (1994).

A fourth involved consumer arbitration law but has significant implications for employment arbitration.[5] Two of the arbitration cases involved efforts to enforce arbitration agreements and two involved post-arbitration challenges to awards. The number of cases and the interest in the cases, as exemplified by the thirty-seven amicus briefs filed in the four cases, demonstrates the growing importance of arbitration as a dispute resolution mechanism. These arbitration cases followed *Wright v. Universal Maritime Service Corp.*[6] in the 1998 term and *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*[7] in the 1999 term. The Court has already granted certiorari in an arbitration case for the 2001 term.[8] Arbitration cases promise to continue to be the focus of employment litigation for the foreseeable future.

A. The Enforcement of Arbitration Agreements

1. Circuit City Stores v. Adams

The most publicized, and certainly the most significant, arbitration case of the 2000 term was *Circuit City Stores, Inc. v. Adams.*[9] Saint Clair Adams signed Circuit City's Dispute Resolution Agreement ("DRA") at the time he applied for employment. The DRA specified that it was not a contract of employment. Had Adams refused to execute the DRA, which required binding arbitration of all employment-related disputes, his application would not have been considered by Circuit City. After several years of employment as a sales

5. The fifth case, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001), involved the question of whether an Indian tribe waived sovereign immunity by agreeing in a commercial contract to arbitrate disputes and to permit the enforcement of arbitration awards in state court. This case will not be discussed in detail because of its minimal relevance to employment law.

6. 525 U.S. 70 (1998) (holding that union waiver of employee right to litigate statutory claim must be clear and unequivocal).

7. 529 U.S. 193 (2000) (holding Federal Arbitration Act venue provisions are permissive rather than mandatory).

8. EEOC v.Waffle House Inc., 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001). See discussion of the case *infra* notes 160-190 and accompanying text, and Editor's Note, *infra* note 191.

9. 121 S. Ct. 1302 (2001). The case drew a total of eighteen amicus briefs, nine in support of Circuit City's position and nine in support of Adams' position. All facts recited herein are from the Supreme Court opinion unless otherwise noted.

counselor, Adams sued Circuit City in California state court. He alleged violations of state statutory discrimination law and several common law claims relating to his employment. Circuit City persuaded the United States District Court for the Northern District of California to stay Adams' state court action and order arbitration.[10] The Ninth Circuit Court of Appeals reversed, holding that the Federal Arbitration Act ("FAA")[11] was not applicable to the case because the DRA was part of an employment contract, and the FAA excludes from its coverage contracts of employment.[12] The Ninth Circuit's decision conflicted with those of eleven other circuits, which had read the FAA's exclusion for employment contracts more narrowly.[13] The Ninth Circuit's holding left arbitration agreements in employment contracts to be enforced under state law, since, absent FAA coverage, no federal mechanism for enforcement existed outside the collective bargaining context.[14]

The arguments in the Supreme Court focused on the language and the sparse legislative history of Sections 1 and 2 of the FAA, enacted in 1925. Section 1 contains the employment contract exclusion which states, "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[15] Section 2 provides, in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to

10. 1998 U.S. Dist. LEXIS 6215, at *2 (N.D. Cal. Apr. 29, 1998), *rev'd*, 194 F.3d 1070 (9th Cir. 1999), *rev'd*, 121 S. Ct. 1302 (2001).

11. 9 U.S.C. §§ 1 -16 (2000).

12. 194 F.3d 1070, 1070-71 (9th Cir. 1999), *rev'd*, 121 S. Ct. 1302 (2001).

13. *See* 121 S. Ct. at 1306-07 (citing McWilliams v. Logicon, Inc., 143 F.3d 573, 575-576 (10th Cir. 1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997); Cole v. Burns Int'l Sec. Servs.,105 F.3d 1465, 1470-1472 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-748 (5th Cir. 1996); Asplundh Tree Co. v. Bates, 71 F.3d 592, 596-601 (6th Cir. 1995); Erving v.Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir.1971); Tenney Eng', Inc. v. United Elec. & Machine Workers of Am., 207 F.2d 450 (3d Cir. 1953)).

14. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957), the Supreme Court held that Section 301 of the Labor Management Relations Act provided for both federal court jurisdiction and the development of federal substantive law for the enforcement of arbitration provisions in collective bargaining agreements. *Id.* at 451.

15. 9 U.S.C. § 1 (2000).

> settle by arbitration a controversy arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[16]

Circuit City urged the Court to adopt the construction of the majority of the appellate courts that the exclusion applied only to contracts of transportation workers.[17] In support of this interpretation, the employer cited the FAA's purpose of reversing judicial hostility toward enforcement of arbitration agreements.[18] In addition, the employer asserted two rules of statutory construction in support of its interpretation. First, the employer urged the Court not to read the statute to render statutory language superfluous. Had Congress intended to exclude all contracts of employment from the FAA, it could have omitted all of the statutory language after the word "employment."[19] Second, the employer contended, the rule of *ejusdem generis* required the Court to read the words following "seamen" and "railroad employees" to refer to workers like the specified workers in kind, i.e., workers engaged in the transportation of people and goods in interstate commerce.[20] Further, the employer urged the Court to read the term "engaged in . . . commerce" in the exclusion more narrowly than "involving commerce" in the section describing agreements to which the statute applied.[21]

The employee, Adams, argued in support of the Ninth Circuit's interpretation, noting that it would make little sense for Congress to exclude from coverage the contracts of those workers over whom it clearly had commerce power, transportation workers, and to include other workers, over whom federal commerce power was far less certain in 1925.[22] Adams also argued that employment contracts are not covered by Section 2 of the FAA because they are not "contract[s] evidencing a transaction involving interstate

16. *Id.* § 2.

17. *See Circuit City Stores, Inc.*, Reply Brief for Petitioner, No. 99-1379, 121 S. Ct. 1302, 1999 U.S. Briefs (Lexis) 1379, at *11 (Oct. 23, 2000).

18. *Id.*

19. *Id.* at *11-12.

20. *Id.* at *9-10.

21. *Id.*

22. *Circuit City Stores, Inc.*, Brief for Respondent, No. 99-1379, 121 S. Ct. 1302, 1999 U.S. Briefs (Lexis) 1379, at *17-18 (Sept. 19, 2000).

commerce" since "transactions" are commercial contracts only.[23] In addition, he pointed out that the employment contract exclusion was inserted in response to the objections of labor to the inclusion of worker contracts. Adams asserted that in 1925 the term "engaged in" commerce described all workers within the commerce power of Congress, and rejected the notion that "involving" and "engaged" evidenced different intent.[24] The other words in the exclusion, "any other class of workers engaged in . . . commerce" also are words of breadth. Finally, Adams noted that since the Court had read the coverage of the FAA to expand as the commerce power expands, the exclusion should be read to expand correspondingly.[25]

Justice Kennedy wrote for the majority, which included Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas. Justice Kennedy began by reciting the Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*[26] that Congress intended in the FAA to assert fully its commerce power, and accordingly, the scope of the statute's coverage had expanded with the commerce power.[27] He then addressed and rejected each of Adams' arguments. If employment contracts were not covered by the Section 2 term "transaction," the exclusion language of Section 1 would be unnecessary.[28] Accordingly, the Court concluded, if all employment contracts are excluded, it must be by virtue of Section 1.[29] Section 1 cannot be read broadly, however, because of the reference to "seamen" and "railroad employees," a specification that would have been unnecessary were all employment contracts excluded.[30] The employer's reliance on the canon of *ejusdem generis* was persuasive to the Court, particularly where Congress used the words "engaged in commerce," which the majority read as having a narrower reach than "involving commerce" or "affecting

23. *Id.* at *19-21.
24. *Id.* at *26-28.
25. *Id.* at *30-31.
26. 513 U.S. 265 (1995).
27. *Circuit City Stores, Inc.*, 121 S. Ct. at 1307.
28. *Id.* at 1308.
29. *Id.*
30. *Id.*

commerce."[31] The majority saw its reading of "engaged in" commerce in the FAA as consistent with its earlier interpretations of similar language and indicated that the interpretation of the language should not depend on the date of its incorporation in the statute.[32]

The Court concluded that the text of the statute clearly precluded an expansive interpretation of the exclusionary language, noting that its interpretation was in accord with the statutory purpose of overcoming judicial hostility to arbitration.[33] Having found the text clear, the Court saw no need to resort to the legislative history.[34] Nevertheless, the Court indicated that the legislative history was limited, and found Adams' reliance on testimony at subcommittee hearings untenable.[35] The Court saw no anomaly in attributing to Congress an intent to exclude from the statute's coverage the employment contracts of workers over whom the commerce power was most certain.[36] The Court indicated that a plausible explanation was the existing arbitration provisions for seamen and the imminent comprehensive statute governing labor relations for railroad employees, which was passed the following year.[37]

Because Adams' underlying claims involved state law, a group of state attorneys general filed an amicus brief indicating their concern that adoption of Circuit City's position would interfere with state law and policy.[38] In responding to this argument, the majority indicated that it was the earlier decision of *Southland Corp. v. Keating*,[39] which was reaffirmed by *Allied-Bruce*,[40] that required the preemption

31. *Id.* at 1308-09.
32. *Id.* at 1309-10.
33. *Id.* at 1311.
34. *Id.*
35. *Id.*
36. *Id.* at 1312.
37. *Id.* The Court explained the additional workers whose contracts were excluded as being part of a reservation of Congressional authority to enact specific provisions for those workers clearly within the commerce power. *Id.*
38. *Id.* at 1312. Brief of the States of California, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Vermont, Washington and West Virginia, as Amici Curiae in Support of Respondent, No. 99-1379, 121 S. Ct. 1302, 1999 U.S. Briefs (Lexis) 1379, at *4 (Sept. 19, 2000).
39. 465 U.S. 1 (1984).
40. 513 U.S. at 272.

of state law. The Court reiterated the value of arbitration and its desire not to frustrate employment arbitration by leaving the enforcement to state law, which would cause unnecessary complications for the parties.[41]

Justices Souter and Stevens authored dissents. Justice Souter's dissent, joined by Justices Stevens, Ginsburg and Breyer, read the Section 1 exclusion's use of the term "engaged in" commerce as extending to the limits of Congress' commerce power in 1925.[42] Since the Court in *Allied Bruce* read Section 2 as evolving with time to encompass the current extent of the commerce power, the Section 1 exclusion should be read similarly.[43] In addition, unlike the majority, Justice Souter had no problem relying for support on Commerce Secretary Hoover's testimony at the subcommittee hearing, where he suggested the exclusionary language of Section 1 to meet labor's objections to the inclusion of workers' contracts in the statute.[44] Justice Souter declined to rely on the canon of *ejusdem generis*, noting that the majority was using the canon to reject legislative history, rather than to interpret the statute where the language and legislative history are unclear.[45] The dissenting opinion agreed with Adams that it would be anomalous for Congress to exclude the very workers over whom it clearly had power, while including those for whom its power was questionable.[46] Although Justice Souter agreed with the majority that Congress may have specifically mentioned "seamen" and "railroad workers" because of specific legislation directed at them, he read these references as affirming that Congress did not intend to affect existing legislation, rather than limiting the exclusion.[47]

41. 121 S. Ct. at 1313. Subsequent to the decision, the Court granted certiorari, vacated the judgment and remanded to the Ninth Circuit Court of Appeals three other cases involving Circuit City's arbitration agreement. Circuit City Stores, Inc. v. Ahmed, 121 S. Ct. 1399 (2001); Circuit City Stores, Inc. v. Ingle, 121 S. Ct. 1399 (2001); Circuit City Stores, Inc. v. Al-Safin, 121 S. Ct. 1399 (2001).

42. 121 S. Ct. at 1320 (Souter, J., dissenting).

43. *Id.* at 1319-20 (Souter, J., dissenting) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)).

44. *Id.* at 1320, 1322 (Souter, J., dissenting).

45. *Id.* at 1322 n.2 (Souter, J., dissenting).

46. *Id.* at 1321-22 (Souter, J., dissenting).

47. *Id.* at 1322 (Souter, J., dissenting).

Justice Stevens' dissent was joined fully by Justices Breyer and Ginsburg and in part by Justice Souter.[48] Justice Stevens discussed the legislative history of the bill more extensively than the majority, noting that although nothing in the bill indicated that it would apply to anything other than commercial and admiralty contracts, the bill drew objections from organized labor groups concerned about its use to enforce employment agreements and collectively bargained contracts.[49] Supporters of the bill, including the chair of the ABA committee that drafted the legislation and Secretary of Commerce Hoover, indicated that it was not intended to apply to such contracts, but suggested the language that later became Section 1 to confirm the intent.[50] Justice Stevens found nothing surprising in Congress' adoption of language, perhaps unnecessary, to respond to the concerns of a bill's opponents.[51]

Justice Stevens further noted that in the early years after passage of the statute, courts routinely found that collective bargaining agreements were excluded from the Act.[52] Not until 1953 did the first court decide that only contracts of transportation workers were excluded.[53]

In 1957, the Court decided *Textile Workers v. Lincoln Mills*,[54] in which the union urged the Court to interpret the FAA's exclusion as applying only to transportation workers and to order the employer to arbitrate pursuant to a collective bargaining agreement. Instead of reading the FAA as the majority did in *Circuit City*, the *Textile Workers* Court interpreted Section 301 of the Labor-Management Relations Act, which never mentions arbitration, to provide a cause of action for enforcement of arbitration agreements in collective bargaining contracts.[55] Justice Stevens read *Textile Workers* as supportive of Adams' interpretation of the exclusion.[56]

48. Justice Souter did not join the portion of the opinion discussing the legislative history. *Id.* at 1314.
49. *Id.* at 1315 (Stevens, J., dissenting).
50. *Id.* (Stevens, J., dissenting).
51. *Id.* at 1316 (Stevens, J., dissenting).
52. *Id.* at 1316-17 (Stevens, J., dissenting).
53. *Id.* at 1317 (Stevens, J., dissenting).
54. 353 U.S. 448 (1957).
55. *Id.* at 451.
56. 121 S. Ct. at 1317 (Stevens, J., dissenting).

Finally, Justice Stevens viewed the majority's decision as permitting a policy preference for arbitration, developed long after enactment of the FAA, to deny the correct reading of the statute. To Justice Stevens, the exclusion clearly was motivated by the expressed concerns at the time that inclusion of workers' contracts would permit powerful employers to require powerless employees to accept unfavorable agreements, which would then be enforceable by the courts.[57]

The significance of the *Circuit City* decision cannot be overestimated. Numerous employers have adopted policies requiring their employees to arbitrate all employment disputes, and attorneys representing employers are already reporting a significant increase in the number of clients requesting development of arbitration agreements for their employees. These arbitration policies cover state and federal statutory and common law claims as well as contractual claims. Although some policies allow the employee to choose whether to agree to arbitration, most require agreement to arbitration as a condition of employment. The FAA now clearly provides an enforcement mechanism for such arbitration agreements, except in the transportation industry.[58]

Had the Court read the FAA to exclude most employment contracts, the enforcement of arbitration agreements would have been left to state law. The variations and uncertainties created would have led to years of litigation over enforceability and might well have caused many employers to abandon efforts to require arbitration. Alternatively, such a decision might have spurred Congress to legislate more

57. *Id.* at 1318 (Stevens, J., dissenting).

58. The decision does not delineate the precise scope of the exclusion. It might be read to exclude only contracts of employees actually engaged in the movement of goods or people in interstate commerce. *See id.* at 1307 (noting the interpretation of most courts of appeals). Alternatively, it might exclude all contracts of employment with employees of employers engaged in transportation. *See id.* at 1312 (referencing legislation relating to air lines and their employees). Under the former reading, a contract with a truck driver for a manufacturing company would be excluded while a contract with a janitor for an airline would not, while under the latter reading the opposite result would be reached. The transportation industry remains heavily unionized, *see* Cynthia Engel, *Competition Drives the Trucking Industry*, 124 MONTHLY LAB. REV., Apr. 1998, at 34, 37, and collective bargaining agreement arbitration clauses are enforceable under Section 301 of the LMRA. *See supra* note 55 and accompanying text.

directly about employment arbitration, as substantial questions would have been raised over the enforceability of arbitration of federal claims under state law.

A contrary decision also would have required the courts to determine what constitutes an employment contract, because the FAA's exclusion refers to contracts of employment. While the Ninth Circuit found that Circuit City's arbitration agreement was part of a contract of employment, the agreement itself disclaimed any contractual status.[59] The Court did not have to reach the issue of whether the agreement was, in fact, a contract. In *Gilmer v. Interstate/Johnson Lane Corp.*,[60] the Court declined to reach the issue of the applicability of the FAA employment contract exclusion because the agreement to arbitrate was contained in a securities industry registration application.[61] Employers that desired to retain arbitration systems likely would have attempted to impose arbitration requirements in formats similar to that of the securities industry to avoid the FAA exclusion.

Since the decision favored enforceability, however, the focus of future litigation is likely to be on the fairness of arbitration agreements.[62] The Court's decision in *Green Tree Financial Corp. v. Randolph*,[63] suggests that an arbitration agreement that precludes a plaintiff from effectively vindicating statutory rights will not be enforced.[64] Employees seeking to avoid arbitration of statutory claims will likely

59. *Circuit City, Inc.*, 194 F.3d at 1071.

60. 500 U.S. 20 (1991).

61. *Id.* at 25 n.2 (1991). The issue also was neither raised in the courts below nor encompassed by the petition for certiorari. *Id.*

62. Prior to *Circuit City*, the Ninth Circuit was the only circuit to hold that employees cannot be required to waive their right to litigate future Title VII claims. Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). Several California district courts have read *Circuit City* as overruling *Duffield*. *See* Rooz Abras Eftekhari v. Peregrine Fin. & Secs., 2001 U.S. Dist. LEXIS 16087, at *25 (N.D. Cal. Sept. 24, 2001) (finding that *Circuit City* requires plaintiff to arbitrate Title VII claims); Olivares v. Hispanic Broad. Corp. 2001 U.S. Dist. LEXIS 5760, at *1-2 (C.D. Cal. Apr. 26, 2001) (finding that *Circuit City* requires plaintiff to arbitrate claims under California discrimination statutes). Other district courts have disagreed. *See, e.g.*, Circuit City Stores, Inc. v. Banyasz, 2001 U.S. Dist. LEXIS 16953 at *7 (N.D. Cal. Oct. 11, 2001).

63. 531 U.S. 79 (2000).

64. *Id.* at 88-89. For discussion of *Green Tree*, see *infra* notes 76-101 and accompanying text.

argue that arbitration schemes do not meet this requirement. The amicus brief filed by a number of employee advocacy organizations in *Circuit City* sets forth a series of issues that may affect the fairness of arbitration including: 1) lack of voluntary and knowing waivers of their rights by employees; 2) large fees to arbitrate statutory claims which would not be necessary for judicial enforcement of statutory rights; 3) limits on relief which prohibit employees from receiving remedies that would be available in litigation; and 4) unfair procedures, including shortened statutes of limitations, discovery restrictions, non-neutral arbitrators, employer freedom to change procedures without notice, and unwritten decisions.[65] Similarly the D. C. Circuit, in *Cole v. Burns International Security Services*,[66] and the California Supreme Court, in *Armendariz v. Foundation Health Psychcare Services*,[67] have suggested the elements of a fair arbitration procedure for mandatory employment arbitration. Those elements include: "(1) a neutral arbitrator; (2) more than minimal discovery; (3) a written award; (4) full statutory remedies that would otherwise be available in court; and (5) no burden on the employee to pay either unreasonable costs or any arbitrators' fees or expenses."[68]

Other related avenues for challenging arbitration exist. For example, where an employer imposes an arbitration agreement unilaterally in an employee handbook, particularly one that asserts that nothing in the handbook creates a contract, the employee might argue that no agreement to

65. *Circuit City Stores, Inc.*, Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law; NAACP Legal Defense and Educational Fund, Inc.; National Association for the Advancement of Colored People; Mexican American Legal Defense and Educational Fund; National Partnership for Women & Families; National Women's Law Center; and NOW Legal Defense and Education Fund in Support of Respondent, , No. 99-1379, 121 S. Ct. 1302, 1999 U.S. Briefs (Lexis) 1379, at *13-27 (Sept. 19, 2000). One commentator has suggested that where remedies have been limited in arbitration and the arbitration results in a victory for the employee, the damages issue might be the subject of a judicial action subsequent to arbitration. David S. Schwartz, Short-Circuiting Employee Rights: Compelled Arbitration after *Circuit City* 18-19 (2001) (manuscript on file with the authors).

66. 105 F.3d 1465 (1997). *Cole* was authored by Judge Harry Edwards, who was a well respected labor lawyer and law professor before taking the bench.

67. 6 P.3d 699 (Cal. 2000).

68. *Cole*, 105 F.3d at 1482. *See also Armendariz*, 6 P.3d at 681-90 (relying on the *Cole* requirements).

arbitrate exists.[69] Additionally, where an agreement lacks mutuality of obligation, arbitration may not be ordered.[70] Finally, the arbitration agreement must incorporate the claims that the employer seeks to compel the employee to arbitrate.[71] To date, some lower courts have refused to enforce or have modified arbitration agreements based on one or more of the above enumerated defects, while others have declined to do so, permitting arbitration to proceed despite such provisions.[72] Employers desirous of enforcing arbitration agreements without litigation should draft them so that arbitration is as close as possible to the *Gilmer* Court's description of an alternative forum which forgoes no procedural or substantive rights of the employee.[73]

A bill designed to reverse the *Circuit City* decision was introduced into Congress in June. The Preservation of Civil Rights Protections Act would amend the Federal Arbitration Act so that the only enforceable employment arbitration agreements are those voluntarily agreed to by both the employer and the employee after a dispute arises.[74] While similar legislation has been introduced in each Congress since 1994 without enactment, the *Circuit City* ruling may

69. Schwartz, *supra* note 65, at 12-13 (citing *inter alia* Ramirez de Arellano v. American Airlines, 133 F.3d 89 (1st Cir. 1997)).

70. *Id.* at 13-15 (citing *inter alia* Floss v. Ryan's Family Steak Houses, 211 F.3d 306 (6th Cir. 2000)).

71. *Id.* at 29-30.

72. *Compare Cole*, 105 F.3d at 1482 (interpreting arbitration agreement to require employer to pay all fees) and Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1060, 1062 (11th Cir. 1998) (refusing to require arbitration where large fees imposed on employee, and Title VII damages not available) *with* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1, 16 (1st Cir. 1999) (fee-splitting provision did not affect enforceability of arbitration agreement). *Compare* Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) (severing provision limiting punitive damages while enforcing agreement to arbitrate) *with* Perez v. Globe Airport Sec. Serv., Inc., 253 F.3d 1280 (11th Cir. 2001) (refusing to enforce arbitration agreement which required employee to waive fees and costs that were statutorily available in Title VII action). *Compare* Leonard v. Clear Channel Communications, 1997 WL 581439, at *4 (W.D. Tenn. July 23, 1997) (enforcing unsigned arbitration agreement contained in employment manual) *with* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1304-05 (9th Cir. 1994) (refusing to enforce agreement where employee consent was not knowing and voluntary). *See also* Hooters of Am. v. Phillips, 173 F.3d 933, 935 (4th Cir. 1999) (invalidating arbitration agreement because of unfairness, including exclusive employer control over procedures which the court described as "utterly lacking in the rudiments of even-handedness").

73. *Gilmer*, 500 U.S. at 26, 30-33.

74. H.R. 2282, 107th Cong. (2001). The bill also permits enforcement of collective bargaining agreements. *Id.* at § 3(b)(2).

spur civil rights groups to increase the pressure on Congress to limit mandatory employment arbitration.[75]

2. Green Tree Financial Corp. v. Randolph[76]

Although *Green Tree* is a consumer case, it has significant implications for employment arbitration. Randolph sued Green Tree, through which she financed the purchase of her mobile home, for violating the Truth in Lending Act. The district court dismissed her claim on the basis of the arbitration agreement in the financing contract, and denied her request for certification of a class.[77] After concluding that the dismissal was a final order providing appellate jurisdiction, the Court of Appeals for the Eleventh Circuit reversed, finding that the arbitration agreement did not provide minimum guarantees that Randolph could vindicate her statutory rights through arbitration, since the agreement did not specify the amount and allocation of the arbitral costs.[78] The Supreme Court faced two issues: the appealability of the lower court's decision under the FAA, and the enforceability of the arbitration agreement.

All the justices agreed that an order dismissing all claims and ordering arbitration is a final order under Section 16(a)(3) of the FAA.[79] The longstanding interpretation of "final decision" convinced the court to permit an appeal, although a number of courts of appeal had declined to permit an appeal where an order compelling arbitration was entered in an "embedded proceeding," i.e., one that "involved both a request for arbitration and other claims for relief."[80]

On the substantive issue, however, the justices disagreed, with the same five member majority as in *Circuit City* voting to reverse the decision of the Eleventh Circuit denying

75. *See House Democrats Introduce Legislation to Overturn High Court's* Circuit City *Ruling*, 17 IND. EMP. RTS. (BNA), July 10, 2001, at 53.

76. 531 U.S. 79 (2000).

77. 991 F. Supp. 1410 (M.D. Ala. 1998), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 79 (2000).

78. 178 F.3d 1149 (11th Cir. 1999), *aff'd in part, rev'd in part*, 531 U.S. 79 (2000).

79. 531 U.S. at 86, (citing 9 U.S.C. §16(a)(3) (stating that "an appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title.")).

80. *Id.* at 87.

arbitration. The majority, in an opinion authored by Chief Justice Rehnquist, concluded that although the plaintiff argued that she did not have the resources to arbitrate, she did not meet her burden of establishing that the costs of arbitration would be prohibitive.[81] The record was silent concerning the amount and allocation of arbitral costs.[82] Randolph argued that the silence in the arbitration agreement created a risk that she would be subjected to prohibitive costs which would cause her to abandon her claim [83] (which was worth approximately $15.00 per year to her and each of the other potential class members).[84] The Court recognized that the costs of arbitration might be so great that they could impermissibly interfere with a consumer's statutory right to vindicate her claim.[85] But the Court placed the burden of demonstrating such costs on Randolph, the consumer, and found that she had not met that burden.[86] According to the Court, to hold otherwise would interfere with the policy favoring arbitration.[87] Since Randolph made no showing regarding costs, the Court did not specify what sort of evidence might be sufficient to meet the burden.[88]

Justice Ginsburg's partial dissent argued that the Court should remand for consideration of whether the arbitral forum was accessible to the plaintiff.[89] She drew a distinction between the adequacy of the arbitral forum and its accessibility, asserting that prior decisions specified that the party objecting to arbitration bears the burden of showing its inadequacy, but not necessarily the inaccessibility.[90] Justice Ginsburg noted that Green Tree, a repeat player in arbitration, drafted the contract, and therefore could have

81. *Id.* at 90-91.
82. *Id.* Randolph submitted limited evidence with respect to average arbitration fees of the American Arbitration Association, but the majority found such evidence plainly insufficient. *Id.* at 91 n.6.
83. *Id.* at 90.
84. 991 F. Supp. at 1415.
85. 531 U.S. at 90.
86. *Id.* at 91-92.
87. *Id.* at 91.
88. *Id.* at 92.
89. *Id.* at 93 (Ginsburg, J., dissenting).
90. *Id.* at 93-94 (Ginsburg, J., dissenting). Justice Breyer did not join Section II of the dissent which discusses inadequacy and inaccessibility. *Id.* at 92.

specified both the amount and allocation of costs.[91] Accordingly, it was not clear that the consumer should bear the burden of showing inaccessibility, but rather than deciding the question, Justice Ginsburg would have remanded for evidence of Green Tree's practice regarding fees.[92] Justice Ginsburg read the majority opinion as permitting Randolph to return to court after arbitration with any complaint about cost allocation, noting that the question then was only the timing of the determination as to whether the costs were excessive.[93] Accordingly, a remand would be appropriate. The majority did not reach the question of whether arbitral preclusion of class actions barred enforcement of the arbitration clause because the Eleventh Circuit did not decide that issue, but the dissent read the Court's opinion to permit consideration of that issue by the Eleventh Circuit.[94]

Because *Green Tree* was decided under the FAA, its holding is equally applicable to employment arbitration. The recognition that an arbitration provision might be so costly to plaintiffs that the agreement would be unenforceable as an impermissible intrusion on statutory rights provides promise for future challenges to arbitration agreements. But the Court's willingness to enforce an agreement to arbitrate which is silent on the issue creates difficulties for plaintiffs making such challenges. The plaintiff must file a legal action and initiate discovery to determine costs, without any guidance from the Court as to what constitutes a sufficient showing of excessive cost. Alternatively, the plaintiff must arbitrate and challenge the costs subsequently. The available remedy at that point, however, would seem to be nothing more than financial reimbursement for the costs, rather than the availability of a judicial action.

While the Court did not reach the class action issue, it promises to resurface in the Court, either in *Green Tree* or

91. *Id.* at 95-96 (Ginsburg, J., dissenting).

92. *Id.* at 96 (Ginsburg, J., dissenting). The dissent noted that there are a number of arbitration programs that provide low cost arbitration to consumers and suggested that Green Tree could have specified that arbitration would be conducted under such a program. *Id.* at 95 & n.2.

93. *Id.* at 97 (Ginsburg, J., dissenting).

94. *Id.* at 97, n.4.

another case. Since many consumer cases and some employment cases are financially feasible only if brought on a class basis, the preclusion of class actions by arbitration may prevent or deter statutory enforcement.[95] Lower courts have split on the issue of whether to compel arbitration in cases filed as class actions.[96] Some courts have had no difficulty ordering arbitration in class action cases despite the protests of plaintiffs concerned about deprivation of their right to proceed as a class.[97] In some cases, the courts assumed that the class claims could be arbitrated, while in others the issue of whether the arbitration would proceed on a class or individual basis was not addressed.[98] Other courts have declined to order arbitration in class cases, citing concern about the impact on class claims and the ability to obtain effective relief, particularly where individual claims are small.[99] At least one arbitration provider markets its rules on the basis that they prohibit class actions.[100] Since some companies desiring to avoid class claims seek to preclude them using arbitration agreements,[101] the Court eventually will have to determine whether such agreements are enforceable to prevent class litigation and instead compel individual arbitration. In addition, courts, and perhaps eventually the Supreme Court, must determine whether a class action can proceed in either litigation or arbitration where the arbitration agreement is silent on the class issue. These decisions, regardless of the underlying area of law involved, will have substantial impact on employment law and litigation.

95. For a thorough and detailed analysis of class actions and arbitration, see Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

96. *Id.* at 19, 57-62 and cases cited therein.

97. *Id.* at 60-61 & nn.219-224.

98. *Id.* at 61-62, 65 and cases cited therein. An arbitration agreement may or may not address the question of whether class claims can be arbitrated. *Id.* at 67.

99. *Id.* at 58-59 and cases cited therein.

100. *Id.* at 72 ("The National Arbitration Forum has marketed its rules to corporations in part with the assurance that its rules do not allow for class actions.").

101. *Id.* at 5-10.

B. The Scope of Judicial Review of Arbitration Awards

Two arbitration cases involved challenges to awards by the losing party, which asked the court to set aside the decision on public policy grounds in one case and on the ground that the arbitrator exceeded his authority under the agreement in the other. While both of these challenges arose in the labor context, each promises to affect judicial review of employment arbitration awards.

1. Eastern Associated Coal Co. v. United Mine Workers of America[102]

Labor arbitration awards under collective bargaining agreements are enforceable under Section 301 of the Labor-Management Relations Act.[103] In 1960, the Supreme Court held that collectively bargained arbitration agreements would be read with a presumption in favor of arbitrability, as labor arbitration is a substitute, not for litigation, but for industrial strife.[104] In addition, the Court held that judicial review of awards was limited for the same reason.[105] The Court has held, however, that courts can set aside awards that violate "well-defined" and "dominant" public policies "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[106] Litigation on public policy issues has often focused on arbitral reinstatement of employees who commit acts that could be classified as unlawful or immoral.[107]

Eastern Associated Coal is a typical case. The arbitrator reinstated a truck driver who had twice tested positive for marijuana, subject to a three month suspension, payment of the arbitration costs, continued participation in a substance

102. 531 U.S. 57 (2000).

103. 29 U.S.C. §185 (1994); *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957).

104. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

105. United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 596 (1960).

106. W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983), *(quoting* Muschany v. United States, 324 U.S. 49, 66 (1945)).

107. For a review of the case law, see Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. DISP. RESOL. 91 (2000).

abuse program, continued random testing, and a signed, undated letter of resignation which took effect if the employee tested positive within the following five years.[108] The employer, citing the Omnibus Transportation Employee Testing Act of 1991[109] and the implementing Department of Transportation regulations,[110] asked the court to vacate the award on public policy grounds.[111] The district court, while recognizing a public policy against performance of safety sensitive jobs by employees using drugs, found that the award did not violate the policy.[112] The Fourth Circuit Court of Appeals affirmed the decision in an unpublished opinion.[113] The Supreme Court unanimously affirmed the Fourth Circuit, with Justice Breyer writing the opinion, and Justice Scalia filing a concurring opinion joined by Justice Thomas.

The decision reaffirmed the very narrow scope of the public policy exception, but refrained from limiting it to situations where the award itself either violated positive law or required one of the parties to do so.[114] The Court carefully examined the Omnibus Transportation Employee Testing Act and ascertained several relevant public policies, including a policy against drug use by employees in safety sensitive positions and a policy in favor of drug testing.[115] The Court also found in the Testing Act a policy in favor of rehabilitation of drug users, and further cited the policy supporting determination of disciplinary issues by arbitration where a collective bargaining agreement so provides.[116]

The Court concluded that the policies were not violated by the award, since it punished the driver, required treatment and testing, and made clear that he would be terminated upon another positive test.[117] The Testing Act does not

108. 531 U.S. 57 (2000).
109. Pub. L. No. 102-143, Title V, 105 Stat. 917, 952-65 (1991) (codified at 49 U.S.C. §§ 31306, 31310 (1994)).
110. *See* 49 C.F.R. pt. 382 (2001).
111. 531 U.S. at 63.
112. 66 F. Supp. 2d 796, 805 (S.D. W. Va. 1998), *aff'd mem.*, 188 F.3d 501 (4th Cir. 1999), *aff'd*, 531 U.S. 57 (2000).
113. 188 F.3d 501 (4th Cir. 1999) (unpublished table decision), *aff'd*, 531 U.S. 57 (2000).
114. 531 U.S. at 63.
115. *Id.*
116. *Id.* at 64.
117. *Id.* at 66.

require termination of employees who test positive, but leaves the determination of employment penalty to employers, subject to their collective bargaining agreements.[118] Nor does the Act or its regulations specify any particular penalty for recidivists; indeed the Department of Transportation considered but rejected a regulation that would have imposed a sixty day driving suspension for two failed drug tests.[119] Accordingly, the Court rebuffed the employer's public policy claim.

The concurrence criticized the majority for failing to limit the public policy exception to cases where the award violated or required a party to violate positive law. Justice Scalia suggested that the Court inappropriately left the door open for public policy arguments where the award does not violate positive law, even though the narrow reading of the exception by the Court left little room for an award that would violate public policy without violating positive law.[120] Accordingly, in Justice Scalia's view, leaving open the possibility did nothing more than create confusion and uncertainty.[121]

This is the second time that the Court has granted certiorari in a public policy case raising the scope of the exception. In the first case, the Court did not decide whether to limit the exception to circumstances where the award violates positive law;[122] in the instant case the Court agreed "in principle" that the exception is not so limited, but as Justice Scalia noted, the Court's analysis indicates that awards that do not violate positive law will rarely, if ever, be overturned for public policy reasons.[123] Nevertheless, the Court's failure to close the door on such cases insures that employers will continue to assert that reinstatement of employees by arbitrators violates public policy in cases involving drugs, alcohol, sexual harassment and similar

118. *Id.* at 65. The rules did require removal from the safety sensitive position and completion of drug treatment before return to work. *Id.* at 64.

119. *Id.* at 66.

120. *Id.* at 68 (Scalia, J., concurring).

121. *Id.* Justice Scalia's opinion also argues against applying the exception in cases where there is no violation of positive law, indicating that the courts should not act in such circumstances where the legislature has failed to do so. *Id.*

122. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 45 n.12 (1987).

123. 531 U.S. at 68.

behavior. Public safety will be invoked to challenge the finality of arbitration awards with little gained other than enforcement delay.

Some courts have applied the public policy exception in employment arbitration cases.[124] As employment arbitration increases and more employees obtain favorable reinstatement awards, public policy challenges in the employment arbitration context may grow as well.[125] The narrow standard of review should apply equally in the employment context, given the deferential posture of the courts in employment arbitration.[126]

2. Major League Baseball Players Association v. Garvey[127]

The *Garvey* case also arose out of a collective bargaining agreement and thus, the action for judicial review was brought under Section 301.[128] The interesting factual scenario, however, gives rise to speculation that it may indicate the Court's inclinations in arbitration cases outside the labor context. *Garvey* was an unsigned *per curiam* opinion, decided without briefing or argument, with a short concurrence by Justice Ginsburg and a dissent by Justice Stevens.

Garvey arose out of a series of grievances filed by the Major League Baseball Players Association against the Major League Baseball Clubs, alleging that the Clubs had colluded in the market for free agents in the mid-1980s.[129] After the initial arbitrators found collusion, the Clubs and the

124. *See, e.g.*, PaineWebber, Inc. v. Agron, 49 F.3d 347, 351-52 (8th Cir. 1995) (involving contractual just cause provision); Collins v. Blue Cross Blue Shield, 916 F. Supp. 638, 643-44 (E.D. Mich. 1995) (involving statutory discrimination claims), *vacated on other grounds*, 103 F.3d 35 (6th Cir. 1996). *See also* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 764 (1996) (noting use of public policy as ground for vacatur of commercial awards by courts of appeal).

125. While there are grounds for public policy arguments in cases other than those reinstating employees who have allegedly engaged in improper behavior, the overwhelming majority of the labor cases raising the issue have been discharge cases. Hodges, *supra* note 107, at 95-96.

126. For further discussion of the application of the public policy standard in the employment arbitration context, see Hodges, *supra* note 107, at 145-55.

127. 532 U.S. 504 (2001).

128. *See id.* at 509.

129. *Id.* at 505.

Association negotiated a settlement agreement which established a fund for players injured by the collusion.[130] The Association created a "Framework" for evaluation of players' claims of damage, which provided that players could obtain arbitral review of the fund distribution plan.[131] The arbitrator's authority was to determine "'only whether the approved Framework and the criteria set forth therein have been properly applied in the proposed Distribution Plan.'"[132] Garvey sought arbitration after his claim for damages was rejected by the Association under the Framework.[133] The arbitrator denied Garvey's claim, indicating doubt as to the credibility of the evidence that he offered in support of his claim.[134] The arbitrator stated that the evidence supporting the claim, a letter from the San Diego Padres' president and CEO, contradicted the same individual's testimony in the earlier arbitration on collusion, and for that reason he rejected the letter.[135]

Although the district court denied Garvey's motion to vacate the award, the Ninth Circuit Court of Appeals reversed.[136] The Ninth Circuit decided that the arbitrator "'dispense[d] his own brand of industrial justice'" because the arbitrator refused to credit Garvey's evidence based on its conflict with prior testimony that a panel of arbitrators, chaired by the arbitrator who decided Garvey's case, had decided was false.[137] Thus, the Ninth Circuit thought the arbitrator's failure to credit the subsequent testimony was "inexplicable" and almost "irrational."[138] The Ninth Circuit remanded to the district court to vacate the award,[139] and the district court remanded to the arbitrator for further hearing.[140] Garvey again appealed and the Ninth Circuit, in

130. *Id.* at 506.
131. *Id.*
132. *Id.* (quoting Garvey v. Roberts, 203 F.3d 580, 583 (9th Cir. 2000)).
133. *Id.*
134. *Id.*
135. *Id.* at 507.
136. 203 F.3d 580, 589 (9th Cir. 2000).
137. *Id.* at 588 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).
138. *Id.* at 590.
139. *Id.* at 592.
140. Garvey v. Major League Baseball Players Ass'n, 167 L.R.R.M. (BNA) 2132 (C.D. Cal. 2000).

an unpublished decision, stated that its previous decision had established that the only decision the arbitrator could make on the evidence was that Garvey was entitled to damages.[141] Accordingly, the court ordered the district court to remand the case to the arbitrator with instructions to issue an award in favor of Garvey.[142] On this unusual set of facts, the Supreme Court granted certiorari and reversed.

The opinion began by reiterating the narrow scope of judicial review, which eschews review on the merits and looks only to whether the arbitrator is arguably applying the contract and acting within the scope of contractual authority.[143] Arbitral error, regardless of the severity, does not justify overturning the decision.[144] Because the Ninth Circuit set aside the award based on its disagreement with the arbitrator's factual findings on credibility, the Court reversed.[145] The Court went on to state that even where a court properly overturns an award on procedural or substantive grounds, the Court should remand to the arbitrator rather than decide the dispute itself.[146] While the latter statement is dicta, since the Court found no grounds for overturning the award, it reflects the current view of the Court, which is quite deferential to arbitral authority. The Court did suggest, however, that a decision could be so irrational as to warrant vacatur on grounds that it was not within the arbitrator's authority under the agreement.[147]

Justice Ginsburg concurred, briefly indicating that she agreed that the Ninth Circuit should not have set aside the award and that nothing more needed to be said.[148] Justice Stevens wrote a longer dissent. Justice Stevens suggested

141. 243 F.3d 547 (9th Cir. 2000) (unpublished table decision), *available at* 2000 U.S. App. Lexis 31918, *3, *rev'd*, 532 U.S. 504 (2001).

142. *Id.* at *5.

143. 532 U.S. at 509.

144. *Id.* at 510.

145. *Id.* at. 510-11. The Court also indicated that it did not find any serious error in the award, much less inexplicable or irrational error. *Id.* at 511 n.2.

146. *Id.* at 511.

147. *Id.* Specifically, the Court said: "If a remand is appropriate *even* when the arbitrator's award has been set aside for 'procedural aberrations' that constitute 'affirmative misconduct,' it follows that a remand ordinarily will be appropriate when the arbitrator simply made factual findings that the reviewing court perceives as 'irrational.'" *Id.*

148. *Id.* at 512 (Ginsburg, J., concurring).

that while the test for judicial review is settled, the cases provide little guidance regarding the standards to be used to determine when arbitrators exceed their authority.[149] Thus, he would have preferred to hear the case after briefing and argument, particularly where the Court reached out unnecessarily to decide the matter of remedy.[150] In its present posture, however, Justice Stevens could not agree with the Court's decision. He noted further that it was unclear whether the majority held that a court may never overturn a decision based on a factual error, or whether the error in the instant case was insufficient to warrant rejection of the award.[151] If it is the latter, in Justice Stevens' view, the Court failed to explain its standards or reasoning.[152]

As in *Eastern Associated Coal*, the Court emphasized the narrow scope for judicial review. Although the Court treated *Garvey* as a labor case under Section 301, the arbitrator's decision was actually far removed from interpreting the collective bargaining agreement. The arbitrator was interpreting a Framework established by the union for allocating a settlement fund which resulted from an arbitration that interpreted the collective bargaining agreement. Thus, arbitral expertise in interpreting collective bargaining agreements, a significant part of the rationale for the judicial deference to the arbitrator mandated in the *Steelworkers Trilogy*,[153] played no role in the case before the Court. Given the absence of such rationale, the decision may signal that the Court will give substantial deference to arbitral decisions in employment matters where the arbitrator is interpreting an individual employment contract, an employee handbook, or a statute.[154]

149. *Id.* (Stevens, J., dissenting).

150. *Id.* at 513 (Stevens, J., dissenting).

151. *Id.* at 513 n.1 (Stevens, J., dissenting).

152. *Id.* (Stevens, J., dissenting).

153. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), United Steelworkers v. Warrior & Gulf Mfg. Co., 363 U.S. 574 (1960), and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) are collectively known as the *Steelworkers Trilogy*. The cases articulated the national labor policy favoring arbitration, including the presumption of arbitrability and judicial deference toward the arbitrator's decision.

154. *See Analysis: Supreme Court Continues Trend of Limiting Review of Arbitrators' Awards in Rejecting Ruling for Baseball Player*, 167 LAB. REL. REP. (BNA), May 28, 2001, at 105, 108.

Judicial review might be more searching, however, when the arbitration involves a statutory rather than a contractual claim. There has been substantial scholarly debate about the appropriate scope of review for arbitration awards on statutory claims.[155] Although scholars have advocated *de novo* review of legal issues in arbitral decisions on statutory claims,[156] most courts have refused to vacate awards on the basis of an erroneous legal interpretation. Rather, they have required a showing that the arbitrator acted in "manifest disregard of the law."[157] The latter is a narrow standard, which has been interpreted by many courts to require a demonstration that the arbitrator was aware of the correct interpretation of the law but failed to apply it.[158] While there are certainly policy reasons for courts to review more carefully arbitral decisions on statutory claims in order to insure that statutory objectives are not being undermined, the Supreme Court's deference to arbitration this term provides optimism for those who advocate limited judicial review of all arbitration awards.

C. The Justices and Arbitration

Analysis of the positions of the justices in the arbitration cases reveals several patterns. In the cases involving enforcement of arbitration agreements under the FAA, five justices have consistently voted in favor of enforcement and four against. Voting in favor of enforcement are Chief Justice Rehnquist and Justices Scalia and Thomas, who typically vote against employee interests, and Justices Kennedy and O'Connor, who tend to be less predictable in employment cases.[159] Justices Breyer, Ginsburg, Souter and Stevens, who

155. *See, e.g.*, RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 137 (1997); Robert N. Covington, *Employment Arbitration After* Gilmer: *Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to* Gilmer, 44 HASTINGS L.J. 1187 (1993).

156. Malin & Ladenson, *supra* note 155, at 1238, 1240.

157. *See* BALES, *supra* note 155, at 136; Hayford, *supra* note 155, at 474.

158. *See* BALES, *supra* note 155, at 136.

159. *See* Ann C. Hodges & Douglas D. Scherer, *The Employment Law Decisions of the October 1999 Term of the Supreme Court: A Review and Analysis*, 4 EMPLOYEE

typically vote to protect employee interests, have been reluctant to enforce arbitration agreements imposed on employees and consumers with little bargaining power. Where the arbitration agreement is negotiated by a union, however, providing more power to the employees, all of the justices have been willing to defer to the arbitrator's decision in post-arbitral judicial review. The one exception was Justice Stevens in *Garvey*, but he argued only that the Court should have had briefing and argument before deciding whether to enforce the award.

1. EEOC v. Waffle House

The Court has granted certiorari in the case of *EEOC v. Waffle House*,[160] a Fourth Circuit decision dealing with the impact of an arbitration agreement on the EEOC's ability to seek individual relief. The employee in *Waffle House* signed an application for employment requiring him to arbitrate any dispute or claim concerning his employment.[161] When he was terminated from his position of grill operator after suffering two seizures, he filed a charge with the EEOC alleging that his discharge violated the Americans with Disabilities Act.[162] The EEOC filed an enforcement action against the employer. In response, the employer asked the court to compel arbitration pursuant to the employee's agreement on the application, and either stay or dismiss the court action.[163] The district court denied arbitration on the ground that the employee's application, and therefore the arbitration agreement, had been filed at a facility other than the one at which he was hired.[164] The Fourth Circuit disagreed, and went on to analyze whether the arbitration agreement affected the EEOC's action.[165]

The court began by recognizing that the ADA contains a "dual enforcement system" which gives rights to individuals

RTS. & EMPLOYMENT POL'Y J. 177, 179 (2000).

160. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001).
161. *Id.* at 807.
162. *Id.*
163. *Id.* at 808.
164. *Id.*
165. *Id.* at 808-09.

and the EEOC.[166] Thus, the EEOC has an independent right and duty to enforce the statute, acting in the public interest rather than the interest of any individual affected by discrimination.[167] The Supreme Court indicated in *Gilmer v. Interstate/Johnson Lane Corp.*[168] that an arbitration agreement does not prevent an employee from filing a charge of discrimination with the EEOC, and stated that arbitration agreements "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."[169] Relying on *Gilmer*, and the statutory provisions authorizing independent EEOC actions, the court decided that the EEOC could not be compelled to arbitrate pursuant to an employee's arbitration agreement.[170] Nevertheless, the court concluded that the policy favoring arbitration barred the EEOC from seeking individual relief for the employee.[171] The EEOC could, however, seek both affirmative and negative injunctive relief barring discrimination on the basis of disability and requiring the employer to establish policies to provide equal employment opportunities for individuals with disabilities.[172]

Prior to the *Waffle House* decision, the Sixth Circuit and the Second Circuit had addressed the effect of individual arbitration agreements on the EEOC's authority to sue. In *EEOC v. Kidder, Peabody, Inc.*,[173] an Age Discrimination in Employment Act (ADEA)[174] case, the Second Circuit held that an arbitration agreement precluded the EEOC from seeking monetary relief on behalf of a charging party, but not broad injunctive relief. Because the case sought only monetary damages, it was dismissed.[175] In *EEOC v. Frank's Nursery & Crafts, Inc.*,[176] the Sixth Circuit found the EEOC's suit

166. *Id.* at 810-11.
167. *Id.* at 811.
168. 500 U.S. 20, 28 (1991).
169. *Id.* at 32, quoted in *Waffle House*, 193 F.3d at 811.
170. *Waffle House*, 193 F.3d at 811.
171. *Id.* at 812-13 (barring the EEOC from proceeding in court seeking back pay, reinstatement, compensatory or punitive damages for the employee).
172. *Id.* at 812-13. Judge King dissented, agreeing with the district court that there was no agreement to arbitrate. *Id.* at 813-14 (King, J., dissenting).
173. 156 F.3d 298 (2d Cir. 1998).
174. 29 U.S.C. §§ 621-34 (1994).
175. 156 F.3d at 301-03.
176. 177 F.3d 448 (6th Cir. 1999).

unaffected by an individual's arbitration agreement.[177] The circuit split led to the grant of *certiorari.*

The majority in *Frank's Nursery* wrote a lengthy opinion supporting its decision.[178] Like the Fourth Circuit, the Sixth Circuit analyzed the statute, legislative history and prior decisions, concluding that charging parties and the EEOC have separate and independent causes of action.[179] The charging party's agreement to arbitrate could not bind the EEOC, which was not a party to the arbitration agreement, nor did the agreement waive the EEOC's independent right to litigate, which attached once the charge was filed.[180] The independence of the claim, and the EEOC's broader public interest, convinced the Sixth Circuit to permit the EEOC to recover damages for the individual despite the arbitration agreement.[181] The court concluded that the doctrines of preclusion, election of remedies and waiver did not bar the EEOC's claim for relief for the individual.[182]

The Second Circuit in *Kidder, Peabody* analogized the case to an individual's settlement or waiver of her claim, which precludes the EEOC from seeking relief on her behalf.[183] The Sixth Circuit, however, determined that, because the individual did not control the EEOC's decision of whether to litigate, the individual could not deprive the EEOC of its authority by agreeing to arbitrate.[184] The court further noted that allowing individual agreements to limit the agency to injunctive relief would interfere with the EEOC's ability to enforce the statute in the public interest, particularly where the Supreme Court has stated that monetary relief is

177. *Id.* at 455.

178. *Id. at 452-68* A dissent by Judge Nelson agreed with the Second Circuit's opinion in *EEOC v. Kidder, Peabody* that the EEOC could sue for injunctive relief, but not private remedies for the individual. *Id.* at 470-71 (Nelson, J., dissenting).

179. *Id.* at 454.

180. *Id.* at 455. Although the underlying claim in *Frank's Nursery & Crafts* was a Title VII claim and the claim in *Waffle House* an ADA claim, the procedures under the two statutes, and the EEOC's role, are the same because the ADA adopted and incorporated the enforcement procedures of Title VII. *See* 29 U.S.C. § 12117(a) (1994); 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (1994).

181. 177 F.3d at 466.

182. *Id.* at 467.

183. *Kidder Peabody,* 156 F.3d at 302-03.

184. 177 F.3d at 470.

essential to statutory enforcement.[185] The court responded to the argument that allowing the EEOC to sue for individual damages would permit charging parties to avoid arbitration agreements, noting that the individual has no control over EEOC decisions to sue, and given the EEOC's limited litigation resources, most individuals with arbitration agreements can not avoid them by filing an EEOC charge.[186]

This case poses for the Court a choice between enforcing an arbitration agreement to the point of preventing an employee from any judicial recovery on a claim subject to arbitration and recognizing the EEOC's statutory authority to proceed in the public interest even where it means seeking a judicial remedy for an employee who has agreed to arbitrate. The EEOC has a strong statutory argument, particularly in light of amendments to Title VII in 1972 and 1991, both of which granted the agency authority to pursue relief for individuals and expressly indicated that such relief was in the public interest.[187] While the Fourth Circuit's decision leaves the agency free to seek "broad injunctive relief," it is not clear precisely what that is and whether it would be available in a case involving an individual instance of discrimination.[188] In addition, preclusion of individual relief may discourage employees with arbitration agreements from filing charges, diluting the EEOC's ability to enforce the statute even with broad injunctive relief, as the agency is unlikely to be aware of discrimination if no charges are filed.[189] If employers are successful in limiting the EEOC's ability to obtain individual relief for employees and in precluding class action claims using arbitration agreements, the effective enforcement of

185. *Id.* at 466 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

186. *Id.* at 468.

187. *See Waffle House, Inc.*, Brief for Petitioner, No. 99-1823, 122 S. Ct. 754 (2002), 2001 WL 603394 at *17 (May 25, 2001) (citing 42 U.S.C. §§ 2000e-5(a), 2000e-5(f)(1) (1994); 42 U.S.C. §§ 1981a(a)(1) & (a)(2) (1994)); *id.* at *28-29.

188. Waffle House argued that broad relief was unavailable for that reason, but the Court did not decide the issue, leaving it to the district court on remand. 193 F.3d at 813 n.3.

189. *See Waffle House*, Brief of the States of Missouri, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia and the Commonwealth of the Northern Mariana Islands In Support of Petitioner, No. 99-1823, 122 S. Ct. 754 (2002), 2001 WL 575440, at *8-9 (May 25, 2001).

employment discrimination statutes will be severely undermined. The potential impact of the decision is far broader than discrimination claims, as it could limit the ability of federal and state agencies with enforcement authority under various statutes to seek individual relief.[190] If the EEOC can persuade one or more of the five justices that strongly favor enforcement of arbitration agreements that the statutory language and clear congressional intent permit the agency to seek individual relief, the agency may prevail. Although Justices Kennedy and O'Connor are typically the swing votes, the statutory language argument may convince Justices Scalia and Thomas to rule in favor of the EEOC. The judicial momentum favoring arbitration is strong, however, and may carry the day in *Waffle House* as well.[191]

III. EMPLOYEE BENEFITS

A. *Egelhoff v. Egelhoff* - The Court Addresses ERISA Preemption

Like arbitration issues in recent years, ERISA preemption issues have provided much fodder for the Court.[192] The most

190. *See id.* at *4-5, *12-13 (noting various statutes that would be affected including civil rights laws, such as employment discrimination and fair housing laws, and consumer protections laws). Many federal statutes have anti-retaliation provisions enforced by agencies that might be affected as well. *See, e.g.*, 29 U.S.C. § 215 (a)(3) (1994) (prohibiting discrimination against any employee for exercising rights under the Fair Labor Standards Act); *Id.* § 660(c)(1)(prohibiting discrimination against any employee for exercising rights under the Occupational Safety and Health Act).

191. **Editor's Note.** On January 15, 2002, the Supreme Court decided *EEOC v. Waffle House*, 122 S. Ct. 754 (2002). The Court held that EEOC may seek individual remedies for a victim of employment discrimination, even though the victim signed a binding arbitration agreement that covers employment disputes. The Court held that "the EEOC has authority to pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their dispute." 122 S. Ct. at 765. Justice Stevens' opinion for the Court was joined by Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter. Justice Thomas filed a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Scalia.

192. As in the case of arbitration, the Court has already granted *certiorari* in a preemption case for next term. *See* Moran v. Rush Prudential HMO, Inc., 230 F.3d 959 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2589 (2001). *Moran* involves an Illinois law that requires health maintenance organizations ("HMOs") to provide for independent review by a physician where the primary care physician and the HMO disagree about the medical necessity of a treatment. *Id.* at 968. If the independent physician deems the treatment medically necessary, the law requires the HMO to provide it. *Id.* The Seventh Circuit panel found that the law was saved from

recent preemption case, *Egelhoff v. Egelhoff*,[193] dealt with a Washington state statute which provided that upon divorce, designation of a spouse as a beneficiary of a non-probate asset was revoked automatically.[194] Two lawsuits were initiated in state court by the children of a deceased man to recover the proceeds of his life insurance policy and the benefits of his pension plan, both of which designated his former wife as beneficiary.[195] Although the trial courts ruled that the state statute revoking the beneficiary designation was preempted by ERISA, both the state court of appeals, after consolidating the cases, and the Washington Supreme Court held that the statute was not preempted.[196]

Justice Thomas' majority opinion reversing the Washington Supreme Court was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, Souter and Ginsburg. The opinion recognized the breadth of ERISA's preemption provision, but noted that it cannot be read literally because preemption of all statutes that "relate to" any employee benefit plan could nullify virtually all state legislation.[197] Relying on more recent decisions which read the scope of ERISA preemption more narrowly, Justice Thomas indicated that the Court must look to the purpose of ERISA and the effect of the state law on ERISA plans to determine whether Congress intended to preempt the state

preemption by the insurance savings clause of ERISA because it regulated insurance. *Id.* at 969-70 (citing 29 U.S.C. § 1144(b)(2)(A) (1994)). Further, the panel concluded, contrary to the Fifth Circuit in Corporate Health Ins., Inc. v. Texas Dep't of Ins., 215 F.3d 526 (5th Cir. 2000), that the state law did not conflict with ERISA because the Illinois statute required incorporation of the review provision into the plan and thus a suit for enforcement of the state law was nothing more than a suit under ERISA to enforce the plan. 230 F.3d 970-71. Judge Posner, dissenting from the denial of a petition for rehearing *en banc*, argued that if the law is incorporated into the plan, then the law is regulating the plan, not merely insurance, and therefore should be preempted. *Id.* at 974 (Posner, C.J., dissenting). The Seventh Circuit's decision permits state law regulation of benefits decisions by insurance plans and will undermine the goal of plan uniformity. Yet it applies to all HMOs regardless of whether they provide benefits under an ERISA plan. The Supreme Court's decision in *Moran* will further define the scope and application of the preemption provision and the insurance savings clause of ERISA.

193. 121 S. Ct. 1322 (2001).

194. *Id.* at 1324.

195. *Id.*

196. In re Estate of Egelhoff, 968 P.2d 924 (Wash. Ct. App. 1998), *aff'd*, 989 P.2d 80 (Wash. 1999), *rev'd sub nom*, Egelhoff v. Egelhoff, 121 S. Ct. 1322 (2001).

197. 121 S. Ct. at 1324-25.

law.[198] Because the state statute directed ERISA plan administrators to pay benefits in accordance with state law rather than the plan, the connection between the state law and ERISA plans was one that required preemption.[199] The statute dealt with a core aspect of plan administration, payment of benefits, and interfered with a central purpose of ERISA, providing uniform national standards for benefit plans.[200] Thus, the statute imposed a burden on administrators of ERISA plans to determine which state law might apply and affect designation of beneficiary status, rather than simply complying with the plan itself.[201] The majority concluded that the state law directly conflicted with ERISA, which requires administrators to pay benefits in accordance with plan requirements.[202]

Justice Breyer, joined by Justice Stevens, dissented, finding no direct conflict between ERISA and the state law.[203] Justice Breyer read the Washington statute as providing a default rule, which applied only where the plan did not provide otherwise.[204] He noted that the plans at issue said nothing about the validity of a beneficiary designation, except for recognizing that a designation might become invalid, and thus it made sense for state inheritance law to fill the gaps.[205] There is a presumption against preemption where, as here, the law is in an area of traditional state regulation.[206] Justice Breyer viewed the burden of administration imposed by the statute to be minimal, and saw the state statute as consistent

198. *Id.* at 1331.
199. *Id.* at 1332.
200. *Id.* at 1325.
201. *Id.*
202. *Id.* at 1329. The ability of plan administrators to opt out of the state law with specific plan language did not save the statute from preemption, because plan administrators still would have to ascertain all state laws, monitor state laws for changes, and tailor and modify plans in accordance with state law. *Id.*
203. *Id.* at 1331-35 (Breyer J., dissenting). Justice Scalia wrote a brief concurrence in which Justice Ginsburg joined, agreeing that the direct conflict between ERISA and the state law triggered preemption, but noting uncertainty as to what else might be preempted. *Id.* at 1330 (Scalia, J., concurring). He noted that, in his view, ERISA preemption must be interpreted in accord with "ordinary pre-emption jurisprudence." *Id.* at 1331.
204. *Id.* at 1331 (Breyer, J., dissenting).
205. *Id.*
206. *Id.*

with ERISA's goal of protecting employee benefits.[207] Accordingly, since he found no conflict and no preemption of the field, and the state statute did not prevent the accomplishment of any federal objective, Justice Breyer would find no preemption.[208]

While the majority saw the state statute as conflicting with ERISA's requirement that plan administrators follow plan documents,[209] the dissent viewed the state statute as merely filling in the gaps in the plan where terms were not defined or beneficiary designations were not clear.[210] The state statute's involvement with probate and family law, areas of traditional state regulation, might have presaged a decision upholding the state law, but the potential for conflicting obligations for plan administrators regarding payment of benefits convinced the majority to preempt the statute.

There are other state statutes that similarly impact plan administration. An example cited in the opinion is slayer statutes, laws that bar murderers from inheriting from their victims and thereby benefitting from their crimes.[211] While the majority did not decide the issue, it suggested that the state slayer laws and their underlying principle are virtually uniform and longstanding, perhaps minimizing their interference with ERISA's aims.[212] Justice Breyer, on the other hand, pointed out the differences in state slayer statutes, particularly with respect to proof, and noted that unlike the divorce revocation statute, "few, if any, slayer statutes permit plans to opt out of the state property law rule."[213] The petitioner, arguing in favor of preemption of the divorce revocation statute, distinguished the slayer statutes, suggesting that they were so uniform and well-settled at the time of ERISA's passage that they were incorporated into

207. *Id.* at 1334 (noting that it was likely that the plan participant would have preferred that the benefits go to the children).

208. *Id.* at 1335.

209. *See* 29 U.S.C. § 1132(a)(1)(B) (1994) (authorizing plan participants and beneficiaries to sue to enforce the terms of pension and benefit plans covered by ERISA).

210. 121 S. Ct. at 1331 (Breyer, J., dissenting).

211. *Id.* at 1330.

212. *Id.*

213. *Id.* at 1334 (Breyer, J., dissenting).

ERISA as federal common law.[214] Other statutes that might be affected by the decision include simultaneous death statutes and statutes defining death, spouse and child for purposes of inheritance.[215]

Like the Court's earlier preemption decisions, the decision provides no clear line or test to determine ERISA preemption issues. Discerning the preemptive intent of Congress, and separating those instances where preemption was intended from the vast number of statutes that "relate to" employee benefit plans, is a daunting task. It seems likely that case by case analysis will continue to prevail in this area, and that ERISA preemption issues will provide fuel for Supreme Court cases for years to come.

B. Ragsdale v. Wolverine Worldwide, Inc.

The Court will revisit employee benefits during the October 2001 Term in *Ragsdale v. Wolverine Worldwide, Inc.*[216] The Supreme Court granted certiorari to consider the validity of the Department of Labor's regulation requiring covered employers to designate Family Medical Leave Act ("FMLA") leave at the time it is granted, and precluding employers from later counting undesignated leave against the employee's statutory twelve week leave entitlement.[217] The Court of Appeals for the Eighth Circuit concluded that the regulation was invalid because it "directly contradict[ed] the statute by increasing the amount of leave that an employer must provide."[218]

In the case at issue, Ragsdale became ill with cancer before she had worked for the employer for one year.[219] Since

214. *Id.* (making the argument with respect to the slayer rule and also suggesting that the simultaneous death rule might be similarly incorporated).

215. Transcript of Oral Argument, Egelhoff v. Egelhoff, 121 S. Ct. 1322, No. 99-1529, 2000 U.S. Trans. (Lexis) 68, at *2-5 (Nov. 8, 2000); *see also* Brief of the States of Washington, Arkansas, Colorado, Massachusetts, Montana, Oklahoma, Utah, Vermont, and West Virginia, as Amici Curiae in Support of Respondents,1999 U.S. Briefs (Lexis) 1529, at *14 (Sept. 18, 2000).

216. 218 F.3d 933 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 2548 (2001).

217. The regulation invalidated by the Court of Appeals is found at 29 C.F.R. § 825.700(a) (2001).

218. 218 F.3d at 940.

219. All of the facts are taken from the opinion of the Court of Appeals, 218 F.3d 933.

she had not worked for one year, she was not yet eligible for FMLA leave, but was entitled to leave under the employer's plan. Pursuant to that plan she was granted seven months of leave in thirty day increments. She was terminated for exhausting her leave, and since she was still unable to work, she requested FMLA leave. The employer informed her that she had exhausted all of her leave, and denied her request to work on a reduced hour schedule. Several months later, she was released to work and returned to full time work at another employer. Ragsdale's FMLA claim was based on the regulation. She contended that since the employer did not designate her prior leave as FMLA leave, she remained entitled to FMLA leave after she exhausted the leave available under the employer's plan.

If, as the court of appeals concluded, the regulation contradicts the statute, then it must be invalidated under *Chevron*.[220] The court's rationale is based on the intent of Congress to provide twelve weeks of leave as a minimum labor standard, designed to balance the needs of employers and employees.[221] Since the regulations require employers to provide additional leave under some circumstances, the court found them inconsistent with the statute. In addition, the court noted that Congress incorporated explicit notice provisions with specified penalties elsewhere in the statute, and thus its failure to do so here indicates a lack of intent, which the administrative agency cannot override.[222] The court acknowledged, however, that a regulation requiring contemporaneous designation of FMLA leave under some circumstances might be valid, giving the example of an employee whose rights were denied because she could have returned to work after twelve weeks but failed to do so because she was not notified that the leave was FMLA leave.[223] Amici for the employer argued that the regulation discourages employers from providing leave in excess of the FMLA entitlement for fear that it would be used to extend leave, rather than to coincide with FMLA leave and allow

220. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
221. 218 F.3d at 939.
222. *Id.* at 938-39.
223. *Id.* at 939-40.

employees to receive payment.[224]

The regulation does not mandate more than twelve weeks of leave, however, unless the employer fails to designate leave as FMLA leave. Since the statute does not specify when FMLA leave begins or how employers and employees communicate their intent to substitute paid employer leave for unpaid FMLA leave,[225] the regulation can be read as filling gaps left by the statute rather than contradicting it.[226] Moreover, it is designed to effectuate the statute by requiring that employees be given notice of their rights, thereby enabling employees to plan an appropriate balance of family and work obligations.[227] Under this reading, the regulation would be upheld as a permissible agency interpretation designed to fill a gap in the statute.[228]

Given these two divergent readings of the regulation, the Court is likely to break down along familiar lines, with the justices traditionally favoring employer interests finding the regulation invalid and those favoring employee interests voting to uphold the regulation.[229] As in many cases, Justices Kennedy and O'Connor, the swing votes, are likely to determine the outcome.

224. *Brief Amici Curiae of the Equal Employment Advisory Council, LPA, Inc.,and the Chamber of Commerce of the United States in Support of Respondent*, 2000 U.S. Briefs (Lexis) 6029, at *15-18 (Oct. 5, 2001).

225. The statute permits such substitution at the request of either party. 29 U.S.C.§ 2602(d)(2)(A) (1994).

226. *See Brief Amici Curiae of the National Employment Lawyers Association, AARP, Equal Rights Advocates, the Legal Aid Society-Employment Law Center, National Depressive and Manic-Depressive Association, and the National Women's Law Center in Support of Petitioners*, 2000 U.S. Briefs Lexis 6029, at *8-10 (Sept. 7, 2001).

227. *Id.* at *8-13; *Brief for the United States As Amicus Curiae Supporting Petitioners*, 2000 U.S. Briefs (Lexis) 6029 at *16-17 (Sept. 7, 2001). If the employer could retroactively designate leave, there would be little incentive to comply with notice requirements and there would be a risk of leave manipulation by the employer. *Brief of the American Federation of Labor and Congress of Industrial Organizations and the National Partnership for Women and Families as Amicus Curiae in Support of Petitioners*, 2000 U.S. Briefs (Lexis) 6029, at *18-19 (Sept. 7, 2001) (arguing that the categorical rule selected by the Secretary of Labor best effectuates the statutory purpose as contrasted with the suggestion of the court of appeals that retroactive designation be prohibited only where the employee demonstrates a material detriment).

228. *See Chevron*, 467 U. S. at 842-43.

229. *See* Hodges & Scherer, *supra* note 159, at 179 (noting that Chief Justice Rehnquist and Justices Scalia and Thomas consistently favor employer interests, and Justices Breyer, Ginsburg, Souter and Stevens generally support employee interests).

IV. LIMITING PLAINTIFFS' RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT: THE ELEVENTH AMENDMENT AND ATTORNEY'S FEES DEVELOPMENTS

A. *Board of Trustees of the University of Alabama v. Garrett*

Title I of the Americans with Disabilities Act of 1990 (ADA)[230] prohibits employment discrimination on the basis of disability by state and local governments, and by private sector employers with 15 or more employees.[231] Together with other provisions of the ADA, Title I seeks to accomplish the congressional purpose of "[providing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"[232] The principal Title I enforcement mechanism consists of federal court actions brought by individuals alleging disability discrimination, following investigation of discrimination charges filed by these individuals with the EEOC.[233]

In *Board of Trustees of the University of Alabama v. Garrett*,[234] the Supreme Court concluded that this enforcement mechanism, as applied to state government employers, violates the Eleventh Amendment to the Constitution. The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[235] The Eleventh Amendment does not bar a private action in federal court if the state has consented to being sued, and Congress may abrogate the states' immunity from suit if it "unequivocally intends to do

230. 42 U.S.C. §§ 12101-12213 (1994).

231. The ADA defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. . . ." *Id.* § 12111(5)(A). The term "employer" includes state and local governments, but is subject to exceptions for the federal government, Indian tribes, and bona fide private membership clubs. *Id.* § 12111(5)(B).

232. *Id.* § 12101 (b)(1).

233. Under Title I, persons alleging disability discrimination in employment must file charges with the EEOC, and must obtain a notice of right to sue from the EEOC as a prerequisite to filing a federal court action.

234. 531 U.S. 356 (2001).

235. U. S. CONST. amend. XI.

so and 'acts pursuant to a valid grant of constitutional authority.'"[236]

In *Fitzpatrick v. Bitzer*,[237] the Court held that Section 5 of the Fourteenth Amendment[238] gives Congress power to abrogate the states' sovereign immunity from suit by private individuals alleging employment discrimination under Title VII of the Civil Rights Act of 1964.[239] Subsequent cases established that Congress' enforcement power under Section 5 goes beyond prohibiting conduct that violates the Equal Protection Clause, and extends to "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[240]

Fitzpatrick supported congressional efforts to combat discrimination by state government employers on the grounds of race, color, religion, sex, and national origin. Intentional discrimination based upon any of these categories, each of which is listed in Title VII, also would violate the Equal Protection Clause, unless the classification in question survives heightened judicial scrutiny.[241] *Garrett*, on the other hand, involves discrimination on the basis of disability, a

236. 531 U.S. at 363 (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000)). *Garrett* is the latest in a recent series of Eleventh Amendment cases that have focused on the power of Congress to create private party causes of action against states. This subject will be revisited by the Court in its October 2001 Term consideration of *Raygor v. Regents of University of Minnesota*, 620 N.W.2d 680 (Minn. 2001), *cert. granted*, 121 S. Ct. 2214 (2001). *Raygor* involves the constitutionality, under the Eleventh Amendment, of 28 U.S.C. §1367(d), a federal supplemental jurisdiction statute that tolls the running of state statutes of limitations for state law claims (including employment law claims) pending in federal court.

237. 427 U.S. 445 (1976).

238. Section 1 of the Fourteenth Amendment provides, in relevant part: "No State shall . . .deny to any person within its jurisdiction the equal protection of the laws." Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV.

239. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994).

240. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997)).

241. Strict scrutiny applies to classifications based upon race, national origin, and religion, which means that a government defendant must prove that the classification serves a compelling government purpose, and that the means used are narrowly tailored to achieve that purpose. *See*, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). Middle-tier scrutiny applies to classifications based upon gender, which means that a government defendant must prove that the classification "[s]erves important governmental objectives and [is] substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

category that has not been subjected to heightened judicial scrutiny under the Equal Protection Clause.[242] Similarly, last term's decision by the Court in *Kimel v. Florida Board of Regents*[243] involved age discrimination, another category that does not receive heightened judicial scrutiny under the Equal Protection Clause.[244] In *Kimel*, the Court held that the Eleventh Amendment prevents private individuals from bringing actions in federal court against state defendants under the ADEA.

The distinguishing case between *Fitzgerald*, involving race discrimination under Title VII, and *Garrett* and *Kimel*, involving disability discrimination under the ADA and age discrimination under the ADEA, respectively, is *City of Boerne v. Flores*.[245] *City of Boerne*, a 1997 decision, considered the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA).[246] RFRA provided that government may not substantially burden a person's exercise of religion, even by a rule of general applicability, unless "the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.'"[247] The Court considered whether Congress had the power under Section 5 of the Fourteenth Amendment to enact RFRA. The Due Process Clause of the Fourteenth Amendment protects

242. In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 437 (1985), the Court determined that governmental discrimination on the basis of mental retardation is subject to rational basis scrutiny. The Court held that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." *Id.* at 446.

243. 528 U.S. 62 (2000).

244. The Court applies rational basis scrutiny to disability and age classifications, which means that a party challenging the classification must prove that there is no rational connection between the classification and achievement of a legitimate governmental objective. The Court expressed this in *Kimel* as follows: "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* at 83. The Court previously applied rational basis scrutiny to age classifications in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (mandatory retirement of state court judges at the age of 70), *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 301 (1976) (mandatory retirement of state police officers at the age of 50), and *Vance v. Bradley*, 440 U.S. 93 (1973) (mandatory retirement of foreign service officers at age 60).

245. 521 U.S. 507 (1997).

246. Pub. L. No. 103-41, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1 to 4 (1994)).

247. 521 U.S. at 515-6 (quoting 42 U.S.C. § 2000bb-1).

persons from violations of the Free Exercise Clause of the First Amendment,[248] but the definition of violation under RFRA is far more stringent than the constitutional test. In *City of Boerne*, the Court articulated the doctrine that it later applied in *Garrett* and *Kimel*. For an exercise by Congress of Section 5 power to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[249] This means that "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another. . . ."[250] In *City of Boerne*, congruence and proportionality were absent because the RFRA statutory prohibition far exceeded the scope of governmental action that would violate the Free Exercise of Religion Clause.[251]

Therefore, the Section 5 remedial power of Congress is dependent upon there being a constitutional violation to be remedied, and the means chosen by Congress must be congruent with, and proportional to, the violation to be remedied and prevented. Chief Justice Rehnquist expressed these requirements as follows: "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[252] The majority and dissenting opinions in *Garrett* accepted these dual principles, but disagreed about the amount of deference the Court should give to congressional fact-finding.

Patricia Garrett worked as a Director of Nursing for the University of Alabama in Birmingham Hospital. She alleged that the University violated Title I of the ADA by discriminating against her because of her breast cancer.

248. U.S. CONST. amend. I.

249. 521 U.S. at at 520.

250. *Id.* at 530 (citation omitted).

251. In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), the Court held that the Free Exercise of Religion Clause of the First Amendment is not violated by a "valid and neutral law of general applicability." 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

252. *Garrett*, 531 U.S. at 374.

Milton Ash, who worked as a security officer for the Alabama Department of Youth Services, alleged that his employer refused to accommodate his asthma and sleep apnea in violation of Title I. In a combined decision, the district court granted the defendants' motions for summary judgment on Eleventh Amendment grounds,[253] and the Eleventh Circuit Court of Appeals reversed.[254]

Chief Justice Rehnquist's opinion for the Court in *Garrett* was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Breyer's dissent was joined by Justices Stevens, Souter, and Ginsburg. The majority and dissenting opinions disagreed sharply over the extent to which the congressional record revealed a pattern of unconstitutional disability-based discrimination in employment by the states. Because disability classifications are subject to rational basis scrutiny under the Equal Protection Clause, the Constitution is violated only by governmental action that lacks a rational connection to achievement of a legitimate governmental interest.[255] Thus, the majority and dissenting opinions differed over whether the employment practices of the states involved a pattern of irrational exclusion and discrimination.

Chief Justice Rehnquist concluded that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[256] Although the record revealed instances of failure by states to accommodate disabled people, "[w]hether they were irrational. . .is more debatable."[257] Chief Justice Rehnquist continued, "But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[258]

253. *Garrett v. Board of Trustees of Alabama in Birmingham* and *Ash v. Alabama Department of Youth Services*, 989 F. Supp. 1409 (N.D. Ala. 1998), *rev'd*, 193 F.3d 1214 (11th Cir. 1999), *rev'd*, 531 U.S. 356 (2001).

254. *Garrett v. Board of Trustees of Alabama in Birmingham*, 193 F.3d 1214 (11th Cir. 1999), *rev'd*, 531 U.S. 356 (2001).

255. *See supra* note 244 and accompanying text.

256. 531 U.S. at 368.

257. *Id.* at 370.

258. *Id.* The concurring opinion of Justice Kennedy, joined by Justice O'Connor,

The dissent criticized the majority for "[r]eviewing the congressional record as if it were an administrative record."[259] The dissent concluded:

> To apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle – a principle of judicial restraint – on its head. But without the use of this burden of proof rule or some other unusually stringent standard of review, it is difficult to see how the Court can find the legislative record here inadequate. Read with a reasonably favorable eye, the record indicates that state governments subjected those with disabilities to seriously adverse, disparate treatment.[260]

The majority applied the *Boerne* congruence and proportionality test to the ADA prohibition against disparate impact discrimination[261] and ADA obligation to reasonably

also concluded that a pattern of unconstitutional state conduct had not been established:

> The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity. That predicate, for reasons discussed here and in the decision of the Court, has not been established.

Id. (Kennedy, J., concurring).

259. *Id.* (Breyer, J., dissenting). Justice Breyer wrote: "In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate . . . . Nor has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category." *Id.* at 380 (Breyer, J., dissenting). Justice Breyer also referred to "roughly 300 examples of discrimination by state governments themselves in the legislative record." *Id.* at 379. He wrote, "I fail to see how this evidence 'falls far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.'" *Id.*

260. *Id.* at 385 (Breyer, J., dissenting). An example of the information available to Congress was provided by the Solicitor General;

> [W]hile the Disabilities Act was before Congress, the Advisory Committee on Intergovernmental Relations (ACIR) [consisting of six Members of Congress and eleven representatives of state and local governments] surveyed state compliance with prohibitions on employment discrimination and reported that 35% of responding state and local governments had no employees with disabilities, and half had only "one or two." ACIR, Disability Rights Mandates 64 (1989). Further, 82% of state and local government employers harbored moderate to strong negative attitudes and misconceptions about hiring persons with disabilities, based on stereotypes, prejudice, and "feelings of discomfort in associating with disabled individuals."

Garrett, Brief for the United States, No. 99-1240, 531 U. S. 356, 1999 U.S. Briefs (Lexis) 1240 at *33-34 (Aug. 11, 2000).

261. The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C.§ 12112(a) (1994). The ADA defines "discriminate" to include "utilizing standards, criteria, or methods of administration – (A) that have the effect of discrimination on the basis of disability . . . ." *Id.* § 12112 (b)(3), and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test, or

accommodate disabled persons,[262] and concluded, "Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne* . . . ."[263]

The dissent found sufficient evidence of irrational employment discrimination by states against disabled persons, and concluded that Congress acted within its Section 5 power when it prohibited state government disparate impact discrimination and required state government employers to reasonably accommodate disabled employees and applicants for employment. Justice Breyer wrote, "The Court suggests that the Act's 'reasonable accommodation' requirement and disparate-impact standard 'far exceed what is constitutionally required.' But we have upheld disparate impact standards in contexts where they were not 'constitutionally required."[264]

Where does *Garrett* leave disabled persons who are discriminated against by their state government employers, or prospective employers? First, *Garrett* blocks federal court ADA Title I actions by private individuals only if the state is the employer. *Garrett* does not block suit "against a municipal corporation or other governmental entity which is not an arm of the State."[265] Eleventh Amendment sovereign immunity "bars suits against States but not lesser entities."[266] Second, although federal court ADA Title I actions seeking money damages may not be brought against states by private individuals, the Justice Department may bring ADA Title I enforcement actions.[267] Third, private individuals may seek

other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity . . . ." *Id.* § 12112 (b)(6).

262. The ADA defines "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]" *Id.* § 12112(b)(5)(A).

263. 531 U.S. at 372.

264. *Id.* at 385 (citations omitted) (Breyer, J., dissenting).

265. Alden v. Maine, 527 U.S. 706, 756 (1999).

266. *Id.*

267. For enforcement purposes, Title I of the ADA borrows the "powers, remedies,

prospective injunctive relief under the doctrine of *Ex parte Young*,[268] under which a state official may be subjected to a personal action in federal court requiring that he or she comply with the Constitution or a federal statute.

Fourth, an individual may bring an action in state court under an applicable state statute that prohibits employment discrimination by the state on the basis of disability. Fifth, private individuals may bring ADA Title I actions against a state that has consented to suit. For example, Minnesota recently waived its Eleventh Amendment immunity from suit under the ADA and other federal employment statutes.[269] Sixth, Congress could require states to waive Eleventh Amendment immunity from suit under the ADA as a precondition to receipt of federal funds. A bill now is pending before the U. S. Senate that would require states to waive Eleventh Amendment immunity from ADEA actions as a precondition to receipt of federal funds.[270] The constitutionality

and procedures" set forth in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (1994). Title VII gives authority to the Attorney General to bring actions against "a government, government agency, or political subdivision." *Id.* § 2000e-5(f)(1). The Eleventh Amendment does not bar federal court actions against a state brought by the federal government.

268. 209 U.S. 123 (1908).

269. *Minnesota Responds to Garrett Decision, Other States Consider Waiving Immunity to ADA Lawsuits*, 167 LAB. REL. REP. (BNA), June 25, 2001, at 233.

270. On May 22, 2001, Senator Jeffords introduced Senate Bill 928, which provides for a limited waiver by states of their sovereign immunity from suit under the ADEA. 147 Cong. Rec. S5441-01, S5458 (2001). The bill is co-sponsored by Senators Kennedy and Feingold, and provides as follows, in Sections 7 and 8:

> (7) The Supreme Court has upheld Congress' authority to condition receipt of Federal financial assistance on acceptance by the States or other recipients of conditions regarding or related to the use of that assistance, as in Cannon v. University of Chicago, 441 U.S. 677 (1979). The Court has further recognized that Congress may require a State, as a condition of receipt of Federal financial assistance, to waive the State's sovereign immunity to suits for a violation of Federal law, as in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999). In the wake of the Kimel decision, in order to assure compliance with, and to provide effective remedies for violations of, the Age Discrimination in Employment Act of 1967 in State programs or activities receiving or using Federal financial assistance, and in order to ensure that Federal financial assistance does not subsidize or facilitate violations of the Age Discrimination in Employment Act of 1967, it is necessary to require such a waiver as a condition of receipt or use of that assistance.
>
> (8) A State's receipt or use of Federal financial assistance in any program or activity of a State will constitute a limited waiver of sovereign immunity under Section 7(g) of the Age Discrimination in Employment Act of 1967 (as added by section 4 of this Act). The waiver will not eliminate a State's immunity with respect to programs or activities that do not receive or use Federal financial assistance. The State will waive sovereign immunity only

of this exercise of power by the Congress, under its taxing and spending power, is beyond the scope of this article.

How extensive is the harm done to disabled persons by *Garrett*? *Garrett* focused on Title I's prohibition of employment discrimination. But there are other forms of discrimination by states that are of great importance to disabled persons. Some of these are covered by Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[271] A "public entity" is defined to include "any State or local government."[272] Title II thus provides vitally important protections for disabled persons in the areas of public education, public transportation, public housing, access to public buildings, access to services and programs generally available to the public, freedom from physical barriers to voting, access to public recreation sites, and a myriad of other areas in which state discrimination against disabled persons, or state failure to accommodate their needs, blocks full inclusion of disabled persons in those aspects of daily life their fellow citizens take for granted. Title II of the ADA thus directly seeks to achieve the congressional purpose of "[invoking] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[273]

Chief Justice Rehnquist began his opinion in *Garrett* by limiting the scope of the opinion to Title I of the ADA. He wrote: "We decide here whether employees of the State of

> with respect to suits under the Age Discrimination in Employment Act of 1967 brought by employees within the programs or activities that receive or use that assistance. With regard to those programs or activities that are covered by the waiver, the State employees will be accorded only the same remedies that are accorded to other covered employees under the Age Discrimination in Employment Act of 1967."

Id. at *S5459. On September 3, 2001, Senate Bill 928 was favorably acted upon and reported to the Senate by the Senate Health, Education, Labor, and Pensions Committee.

271. 42 U.S.C. § 12132 (1994).

272. *Id.* § 12131(1)(A).

273. *Id.* § 12101(b)(4) (ADA Findings and Purpose).

Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990."[274] Focusing on a possible claim that Title II, like Title I, might encompass a prohibition against employment discrimination, the Chief Justice wrote the following:

> Respondents' complaints in the United States District Court alleged violations of both Title I and Title II of the ADA . . .[N]o party has briefed the question whether Title II of the ADA, dealing with the "services, programs, or activities of a public entity". . . is available for claims of employment discrimination when Title I of the ADA expressly deals with the subject . . . . We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question.[275]

The majority opinion emphasized that the congressional record, including the House and Senate Committee Reports, focused on state discrimination in "public accommodations, public services, transportation, and telecommunications."[276] Similarly, the Appendix to the dissenting opinion of Justice Breyer, listing state by state "[s]ubmissions made by individuals to the Task Force on Rights and Empowerment of Americans with Disabilities,"[277] focused almost entirely on non-employment areas of state discrimination and state failure to reasonably accommodate. These areas of discrimination are covered by Title II, not Title I, of the ADA. Therefore, the congressional record that the majority deemed inadequate to support Congress' exercise of Section 5 power when it enacted Title I of the ADA may be adequate to convince at least one member of the *Garrett* majority that Congress properly exercised its Section 5 power when it enacted Title II of the ADA.

Garrett dealt only with Title I actions and does not preclude federal court actions by private individuals challenging conduct by states that violates Title II.

274. 531 U. S. at 360.
275. *Id.* at 360 n.1.
276. *Id.* at 371-72 (quoting S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990)).
277. *Id.* at 391 (Breyer, J., dissenting).

Unfortunately for victims of Title II violations, remedies available under Title II may not be as extensive as remedies that are available under Title I. The ADA incorporates the remedial provisions of Title VII of the Civil Rights Act of 1964 for violations of Title I, whereas the remedial provisions of Title VI of the Civil Rights Act of 1964[278] are used for violations of Title II of the ADA.[279]

B. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*

Many disability actions brought under Title II seeking declaratory and injunctive relief will be undermined by the Court's recent decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[280] involving awards of attorney's fees under the ADA and other civil rights statutes. *Buckhannon* arose when a state fire marshal ordered that an assisted living residence be closed because some of the disabled residents were unable to vacate the premises without assistance in the event of fire.[281] The group home brought an action under Title II of the ADA and the Fair Housing Amendments Act of 1988 (FHAA),[282] on behalf of itself, similarly situated group homes, and group home residents. While discovery was progressing, the West Virginia Legislature enacted legislation that eliminated the statutory requirement that led to the order by the state fire marshal. The plaintiffs then sought attorney's fees as a "prevailing party" under the FHAA and ADA. The FHAA provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs."[283] The ADA provides that "the court . . ., in its discretion, may allow the prevailing party . . . a reasonable

278. 42 U.S.C. § 2000d (1994).

279. For a discussion of Title II remedy issues, see Cheryl L. Anderson, *Damages for Intentional Discrimination by Public Entities under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, But Are the Remedies the Same?*, 9 BYU J. PUB. L. 235 (1995); Leonard J. Augustine, Jr., *Disabling the Relationship Between Intentional Discrimination and Compensatory Damages under Title II of the Americans with Disabilities Act*, 66 GEO. WASH. L. REV. 592 (1998).

280. 532 U.S. 598 (2001).

281. *Id.* at 601.

282. 42 U.S.C. §§ 3601-3631 (1994 & Supp. IV 1998).

283. 42 U.S.C. §3613(c)(2) (1994).

attorney's fee, including litigation expenses, and costs . . . ."[284]

The plaintiffs relied upon the catalyst theory, under which "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."[285] The decision by Chief Justice Rehnquist, joined by Justices Kennedy, O'Connor, Scalia, and Thomas, rejected the catalyst theory. Rather than focusing upon the intent of Congress in enacting the attorney's fees provisions of the ADA, FHAA, and other civil rights statutes – most notably the Civil Rights Attorney's Fees Awards Act of 1976[286] – the Court placed primary reliance on the Black's Law Dictionary definition of "prevailing party" as a "party in whose favor a judgment is rendered . . . ."[287] The Court criticized the catalyst theory because it "allows an award where there is no judicially sanctioned change in the legal relationship of the parties."[288] The Court concluded:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.[289]

Justice Ginsburg, in a dissent joined by Justices Breyer, Souter, and Stevens, harshly criticized the majority opinion, in part because of its break with established lower court precedent. Her opinion noted:

> Prior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) concluded that plaintiffs in situations like Buckhannon's and Pierce's could obtain a fee award if their suit acted as a "catalyst" for the change they sought, even if they did not obtain a judgment or consent decree. The Courts of Appeals found it "clear that a party may be considered to have prevailed even when the legal action stops short of final . . . judgment due to intervening mootness." Interpreting the term "prevailing party" in "a practical sense" . . . federal courts across the country held that a

284. *Id.* §12205.
285. 532 U.S. at 601.
286. 42 U.S.C. § 1988 (1994).
287. 532 U.S. at 602 (quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)).
288. *Id.* at 606.
289. *Id.*

party "prevails" for fee-shifting purposes when "its ends are accomplished as a result of the litigation."[290]

The dissenters criticized the Court's decision because it "allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint."[291] The dissenters concluded that "the Court's constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' impede access to court for the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general."[292]

Buckhannon's impact on ADA Title I employment discrimination actions will be limited because most of these actions seek money damages, and a pre-trial settlement normally will provide funds for attorney's fees, either as part of the settlement agreement or through the retainer agreement between the attorney and client. However, as discussed above, *Buckhannon* will have a significant impact on Title II actions. It also will have an impact on many actions brought under Title III of the ADA[293] alleging disability discrimination, or failure to reasonably accommodate, by private sector places of public accommodation. Title III covers entities such as hotels, motels, restaurants, entertainment facilities, amusement parks, retail stores, health care providers, and law firms. For Title III violations, the ADA incorporates the remedial provisions of Title II of the Civil Rights Act of 1964,[294] which limits the remedy to "preventive relief."[295] Under *Buckhannon*, voluntary compliance with Title III on the eve of trial (compelled by the pending litigation) may block an award of attorney's fees to plaintiffs

290. *Id.* at 625-26 (citations omitted).
291. *Id.* at 622.
292. *Id.* at 622-23.
293. 42 U.S.C. §12181 (1994).
294. *Id.* § 2000a.
295. Title II of the Civil Rights Act of 1964 prohibits public accommodation discrimination based on race, color, religion, or national origin. The Title II remedial provision provides that "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved . . . ." *Id.* § 2000a-3(a).

who sought declaratory and injunctive relief from public accommodations discrimination that affects large numbers of disabled persons. The *Garrett* decision blocking, on Eleventh Amendment grounds, private actions against states under Title I for employment discrimination, and the *Buckhannon* decision, eliminating the catalyst theory for attorney's fees awards in law suits seeking declaratory and injunctive relief in ADA and other civil rights actions, deliver a devastating double blow to disabled persons and their advocates.

V. EMPLOYMENT DISCRIMINATION DEVELOPMENTS

A. *Pollard v. E.I. du Pont de Nemours & Company*

The Supreme Court upheld well established circuit court Title VII precedent in two October 2000 Term cases, *Pollard v. E.I. du Pont de Nemours & Co.*[296] and *Clark County School District v. Breeden.*[297] *Pollard* concerned front pay awards in Title VII actions, and *Clark County* involved retaliation discrimination because of opposition to practices made unlawful by Title VII and participation in proceedings under Title VII.

In *Pollard*, the unanimous decision written by Justice Thomas[298] supported the Title VII front pay remedy in two ways. First, it confirmed the appropriateness of front pay as a remedy in general. Second, it held that front pay as a remedy is not subject to the dollar amount limitations ("caps") established by the Civil Rights Act of 1991[299] for compensatory and punitive damages under Title VII.[300]

296. 121 S. Ct. 1946 (2001).
297. 121 S. Ct. 1508 (2001).
298. Justice O'Connor did not participate.
299. 42 U.S.C. §§ 1981(a)(1) & (2) (1994).
300. 42 U.S.C. §1981a(b)(3) (1994) provides, in relevant part:

> Limitations – The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party – (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; (B) in the case of a respondent who has more than 100 and fewer

Sharon Pollard worked as an operator in the hydrogen peroxide area of a DuPont plant in Tennessee. She was the victim of severe co-worker sexual harassment, which caused serious emotional harm and led to her need for short term disability leave. The harassment included sabotage of her work through false alarms, and the use by her principal harasser of the terms "bitches," "cunts," and "heifers" to describe women.[301] The triggering event that caused Pollard to take disability leave was an incident in which a male co-worker placed "a Bible on her desk, opened to a passage which read, 'I do not permit a woman to teach or have authority over a man. She must be silent.'"[302]

In her testimony, Pollard described her "nightmares, fear of crowds, nausea, anxiety, and sleeplessness."[303] She was examined by a psychologist and a psychiatrist, each of whom testified at trial that "she suffered from post-traumatic stress disorder."[304]

DuPont's liabilty for the co-worker sexual harassment was established by evidence of a "pervasively hostile environment [that] unreasonably interfered with [Pollard's] work performance,"[305] and by evidence that Pollard's supervisors repeatedly were informed of the co-worker harassment and took no meaningful corrective action. Steve Carney, a control room operator who was primarily responsible for the harassment, "never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated."[306]

When Pollard discussed her return from disability leave with DuPont management, she was told that they "would not guarantee that [she] would not be put back on a shift with

than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

301. Pollard v. E.I. du Pont de Nemours, Inc., 16 F.Supp. 2d 913, 915 (W.D. Tenn. 1998), *aff'd*, 213 F.3d 933 (6th Cir. 2000), *rev'd*, 121 S. Ct. 1946 (2001).

302. *Id.* at 914.

303. *Id.* at 923.

304. *Id.*

305. *Id.* at 922.

306. *Id.* at 924.

Carney."[307] Pollard was terminated when she said that "she could not return to work under those conditions."[308]

These compelling facts led to the district court's remedy dilemma. The court concluded that compensatory damages for emotional pain and suffering, front pay, and punitive damages were appropriate given the egregious nature of the co-worker sexual harassment and inadequate management response. As the court expressed it, "This situation was reprehensible. This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched."[309] However, the district court was bound by the Sixth Circuit decision in *Hudson v. Reno*,[310] in which a three judge panel held that front pay is a form of compensatory damages available to plaintiffs for intentional discrimination under the Civil Rights Act of 1991, and thus is subject to the caps on compensatory damages set forth in the Act. The district court discussed the insufficiency of the $300,000 of compensatory damages, which included front pay, awarded to Pollard:

> The Court notes that the $300,000 award is, in fact, insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in §1981a however, and cannot award plaintiff compensatory damages in excess of that cap.
>
> Because the amount of compensatory damages awarded by the Court is $300,000, the Court is thus prohibited by the statutory cap from awarding plaintiff any punitive damages . . . . For the record, however, the Court finds that punitive damages are justified in this case, as defendant has "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual . . . and, absent the statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation.[311]

307. *Id.* at 921.
308. *Id.*
309. *Id.* at 924.
310. 130 F.3d 1193 (6th Cir. 1997).
311. 16 F. Supp. 2d at 924 n.19 (citations and quotation omitted).

On appeal the Sixth Circuit Court of Appeals panel expressed its disagreement with *Hudson v. Reno*, but concluded:

> [O]ur hands are tied. One panel of this court may not overturn the decision of another panel of this court – that may only be accomplished through an en banc consideration of the argument. Plaintiff does not purport to distinguish *Hudson*. Therefore, we must decline to overturn the district court's decision that front pay is included in the compensatory damages statutory cap found in 42 U.S.C. §1981a.[312]

The Supreme Court took the approach of all circuits other than the Sixth, and concluded that front pay in Title VII cases is not subject to the caps set forth in the Civil Rights Act of 1991. The Court began with a discussion of Section 706(g) of Title VII, as amended in 1972, which authorizes a court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[313] Lower federal courts rely upon this section in granting front pay in lieu of reinstatement in situations where reinstatement would be inequitable, because of harmful impact on third parties or for other reasons, or where reinstatement is not feasible or desirable because of a breakdown in the relationship between the plaintiff employee and the defendant employer. As the Supreme Court put it, "By 1991, virtually all of the courts of appeals had recognized that 'front pay' was a remedy authorized by §706(g). In fact, no court of appeals appears to have ever held to the contrary."[314]

Turning to the text of the Civil Rights Act of 1991, the Court noted that the phrase "compensatory damages" is not defined in the Act,[315] and that, "[i]n the abstract, front pay could be considered compensation for 'future pecuniary losses' in which case it would be subject to the statutory cap."[316] The Court then stated that "we must not analyze one

312. Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 945 (6th Cir. 2000), *rev'd* 121 S. Ct. 1946 (2001).
313. 42 U.S.C. §2000e-5(g)(1) (1994).
314. 121 S. Ct. at 1950-51.
315. *Id.* at 1951.
316. *Id.*

term of §1981a in isolation,"[317] and concluded: "When §1981a is read as a whole, the better interpretation is that front pay is not within the meaning of compensatory damages in §1981a(b)(3), and thus front pay is excluded from the statutory cap."[318]

The Court acknowledged that Congress intended to create additional remedies for Title VII plaintiffs, whereas applying caps to front pay would reduce the available remedy.[319] The Court quoted §1981(a)(1) which provides, in relevant part, that "the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . ."[320] The Court then confirmed the prevailing view of the courts of appeals that Section 706(g) does, in fact, permit the award of front pay, in lieu of reinstatement, and held, "Because front pay is a remedy authorized under §706(g), Congress did not limit the availability of such awards in §1981a. Instead, Congress sought to expand the available remedies by permitting the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay."[321]

The Court's decision in *Pollard* is consistent with congressional intent[322] and avoids many problems. For example, federal courts grant reinstatement in Title VII

317. *Id.*

318. *Id.*

319. The Court wrote:

> Congress expressly found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," without giving any indication that it wished to curtail previously available remedies. Congress therefore made clear through the plain language of the statute that the remedies newly authorized under §1981a were *in addition to* the relief authorized by §706(g).

Id. (citation omitted).

320. *Id.*

321. *Id.* at 1952.

322. Senator Kennedy spoke on the floor of the Senate concerning the final version of the bill that became the Civil Rights Act of 1991, as follows: "Compensatory damages do not include backpay, interest on backpay, or any other type o[f] relief authorized under Section 706(g) of the Civil Rights Act of 1964, including front pay." 137 Cong. Rec. S15233-02, S15234 (1991). Similarly, the Interpretive Memorandum placed in the Congressional Record by Senator Danforth and other Republican senators stated that "limitations . . . placed on damages . . . under Section 1981A . . . cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII . . . ." *Id.* at S15472-01, S15483.

termination cases if reinstatement is feasible and equitable, but often conclude that front pay in lieu of reinstatement is a more equitable remedy. If caps were placed on front pay awards, the result in many cases would be for courts to order reinstatement to preserve plaintiffs' ability to be made whole with other forms of compensatory damages. This would happen even though front pay otherwise would be a more appropriate remedy than reinstatement, either because it would avoid unnecessary workplace disruption, or because it would avoid hardship for an employee who, like Sharon Pollard, would be returning to a poisoned and hostile workplace.[323]

Caps on front pay awards would undermine judicial efficiency. The possibility that a jury might award front pay would force a federal judge to decide if the equitable remedy of reinstatement should be used rather than front pay, and the judge would need to make this determination, at the latest, before all of the evidence is presented and before closing arguments.[324] Caps on front pay awards also would motivate some employers to continue in their unlawful practices once they realize that the financial exposure they faced had reached the applicable cap, a cap that includes the front pay and compensatory and punitive damages they may have to pay.[325]

The decision by the Court in *Pollard* reflects the intent of Congress, when it enacted the Civil Rights Act of 1991, to provide additional remedies for victims of intentional employment discrimination. The decision also preserves front pay as a means for making whole victims of employment discrimination and for motivating employers to comply voluntarily with Title VII.

B. *Clark County School District v. Breeden*

The Court's per curiam decision in *Clark County School District v. Breeden*[326] reversed an unpublished Ninth Circuit

323. *Pollard*, Brief for the Petitioner, No. 00-763, 121 S. Ct. 1946, 2000 U.S. Briefs (Lexis) 763 at *38-49.
324. *Id.*
325. *Id.* at *45.
326. 121 S. Ct. 1508 (2001).

panel decision in favor of the plaintiff in a Title VII action alleging retaliation because of opposition to practices made unlawful by Title VII and because of participation in proceedings under Title VII.[327] The district court had granted the defendant's motion for summary judgment. The court of appeals reversed and remanded for further proceedings at the trial level.

Shirley Breeden worked as an administrator in the Human Resources Division of the Clark County School District. Her duties included review of job applications and related materials. The incident that gave rise to her law suit occurred at a staff meeting she attended with her supervisor, Don Eldfrick, and her subordinate, Jim McIntosh. The three administrators reviewed a psychological evaluation report which stated that a job applicant once said to a co-worker, "I hear making love to you is like making love to the Grand Canyon."[328] Eldfrick looked at Breeden and said, "I don't know what that means."[329] McIntosh responded, "Well, I'll tell you later,"[330] and both men "chuckled."[331]

Breeden was offended by the comments and laughter of the two men. Later in the day, she complained to Eldfrick and to his supervisor, George Ann Rice. In her subsequent judicial complaint, Breeden alleged that she suffered retaliation from Eldfrick because of the complaints, in the form of hostile treatment on the job.

Breeden filed charges with the Nevada Equal Rights Commission and the EEOC, received a notice of right to sue from the EEOC, and filed an action in federal court. Breeden alleged that she suffered retaliation, in the form of a transfer, because of her judicial complaint. After it became clear that

327. Section 704(a) of Title VII provides:
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
42 U.S.C. § 2000e-3 (1994). The first and second parts of Section 704(a) are known, respectively, as the opposition clause and participation clause.

328. 121 S. Ct. at 1509.

329. *Id.*

330. *Id.*

331. *Id.*

Rice decided to transfer Breeden before the complaint was filed and served on the school district, and before Rice knew about the law suit, Breeden alleged that the transfer was made in response to the school district's receipt of its copy of the notice of right to sue.

This second allegation related to her participation in proceedings under Title VII. Charging parties are protected from retaliation if they can prove a causal link between their participation and an adverse employment action. In the view of the circuit court panel, Breeden "raised a genuine issue of material fact and has alleged sufficient facts to survive summary judgment."[332] The court of appeals reviewed the record and found a possible "causal link"[333] between participation activity and the transfer because:

> Rice's discussion about transferring Breeden occurred approximately three months after the EEOC's right-to-sue letter was sent to both parties, and her final decision to reassign Breeden occurred less than one month after she learned of the suit, both of which events are sufficiently proximate in time to raise a genuine issue of fact as to causation.[334]

By the time the case reached the Supreme Court, Breeden was relying only upon a causal connection between the notice of right to sue and the transfer decision. The Court reviewed the record and disagreed with the court of appeals concerning the causation significance of the employer's receipt of Breeden's notice of right to sue. The Court viewed the facts as follows:

> The Ninth Circuit's opinion . . . suggests that the letter provided petitioner with its first notice of respondent's charge before the EEOC, and hence allowed the inference that the transfer proposal made three months later was petitioner's reaction to the charge. This will not do. First, there is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent. And second, if one presumes she knew about it, one must also presume that she (or her predecessor) knew *almost two years earlier* about the protected action (filing of the EEOC

332. *Breeden v. Clark County School District*, 232 F.3d 893 (9th Cir. 2000) (unpublished table decision), *available at* 2000 WL 991821, at **3.

333. *Id.*

334. *Id.* (citing Nidds v. Schindler Elevator Corp., 113 F.3d 912, 919 (9th Cir. 1997) (holding that four months provides sufficient proximity to establish a causal link)).

> complaint) that the letter supposedly disclosed . . . . The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," . . . . Action taken (as here) 20 months later suggests, by itself, no causality at all.[335]

The Court's presumption that the decision-maker Rice knew about the filing of the EEOC charge "almost two years earlier," and the Court's apparent conclusion that the transfer decision thus would have been motivated by the earlier charge filing and not the more recent receipt by the employer of the notice of right to sue, led the Court to a different conclusion from that of the court of appeals concerning the causation link between protected activity and the transfer decision. That is, the court of appeals focused upon a three month time period, beginning with receipt by the employer of the notice of right to sue, whereas the Supreme Court focused upon a twenty month time period, beginning with notice to the employer of the initial EEOC charge. With respect to proof of causation through focus upon the amount of time between the decision-maker's first having knowledge of the relevant protected activity and the transfer decision, there is a genuine issue of material fact that should have been decided by a jury, and one wonders why the Supreme Court wandered into the domain of the jury on this issue.

The Court's discussion of the opposition claim does seem to have doctrinal significance. The Ninth Circuit, consistent with all other circuits, concluded there need not be an actual violation of Title VII for opposition to be protected. Instead, in the view of the Ninth Circuit, Breeden must have had a "reasonable, good faith belief"[336] that Title VII was violated.

The Supreme Court adopted this approach, without adopting the specific language used by the Ninth Circuit. It wrote:

> The Court of Appeals for the Ninth Circuit has applied § 2000e-3(a) to protect employee "oppos[ition]" not just to practices that are actually "made. . .unlawful" by Title VII,

335. 121 S. Ct. at 1511 (citations omitted).
336. 2000 WL 991821, at **1.

> but also practices that the employee could reasonably believe were unlawful . . . . We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.[337]

Circuit court of appeals opinions in all but the Sixth Circuit, and district court opinions in the Sixth Circuit, have considered what the Title VII legal test should be for opposition retaliation. They unanimously have concluded that an actual violation of Title VII is not required, but that the plaintiff must believe that a violation has occurred, and this belief must be a reasonable one under the circumstances. Some circuits describe this requirement through use of the phrase "reasonable belief,"[338] while other circuits describe the same requirement through combined use of the phrases "good faith," and "reasonable belief."[339] Despite the difference in phraseology, all circuits are describing a similar requirement of subjective belief combined with objective reasonable belief that Title VII has been violated.

The Court's opinion in *Breeden* seemingly establishes that the Supreme Court accepts the unanimous view of the Circuit Courts of Appeals that actionable opposition retaliation does not require an actual violation of Title VII, but does require that the plaintiff believe Title VII has been violated and that a reasonable person, under the same circumstances, would believe that Title VII has been violated. The Court's endorsement of this lower court doctrine was not stated directly, but would seem to be implicit in the Court's rejection of Breeden's claim because "no one could reasonably

337. 121 S. Ct. at 1509 (citations omitted).

338. *See, e.g.*, Little v. Windermere Relocation, Inc., 265 F.3d 903, 913 (9th Cir. 2001); Hamner v. St. Vincent Hosp., 224 F.3d 701, 705 (7th Cir. 2000); EEOC v. HBE Corp., 135 F.3d 543, 551 (8th Cir. 1998); Childress v. City of Richmond, 120 F.3d 476, 482 (4th Cir. 1997); Wyatt v. City of Boston, 35 F.3d 13,15 (1st Cir. 1994); Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865 (3d Cir. 1990); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981). The phrase "reasonable belief" is used in a Sixth Circuit district court opinion. Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F.Supp. 800, 807 n.5 (W.D. Tenn. 1985).

339. *See, e.g.*, McMenemy v. City of Rochester, 241 F.3d 279, 283 (2d Cir. 2001); Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999); Parker v. Baltimore and Ohio RR, 652 F.2d 1012, 1020 (D.C. Cir. 1981). The phrase "good faith, reasonable belief" is used in a Sixth Circuit district court case. Miller v. Rudd, 2001 WL 242588, at *15 (S.D. Ohio 2001).

believe that the incident recounted above violated Title VII."[340] The Court more clearly articulated an objective standard when it wrote, "No reasonable person could have believed that the single incident recounted above violated Title VII's standard."[341]

Breeden may present an example of the type of incident that would be subjectively offensive to some people, but that falls so short of the mark for actionable sexual harassment that a reasonable person would not conclude that Title VII has been violated. As the Court held in *Meritor Savings Bank, FSB v. Vinson*,[342] "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[343] Regardless of the extent, or unfairness, of retaliation suffered by an employee because of his or her opposition to an employer's practice, the employee is protected by Section 704(a) only if the practice opposed violates Title VII or the employee has a reasonable belief that it violates Title VII.

VI. CONCLUSION

On balance, the October 2000 Term of the Supreme Court significantly undermined protections provided to employees by employment discrimination statutes. *Circuit City* permits employers to force employees to waive their rights to a judicial forum for vindication of federal and state statutory rights, and *Garrett* eliminates the ADA as a meaningful source of protection for state employees from disability discrimination by state government employers. The October 2000 Term's erosion of the rights of employees is part of a more general pattern in which five members of the court, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Thomas and Scalia, have joined together to tilt the scales against employees in cases before the Court.

340. 121 S. Ct. at 1509.
341. *Id.* at 1510.
342. 477 U.S. 57 (1986).
343. *Id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

Therefore, the outcome in many employment cases in the future will be determined by Justices Kennedy and O'Connor, as they join either Chief Justice Rehnquist and Justices Scalia and Thomas in undermining employee rights, or Justices Breyer, Ginsburg, Souter and Stevens in supporting the rights of employees in the workplace.